2003

# Don Fitzgerald, Norma Fitzgerald, Steven Fitzerald, and Cloverleadf Ranch, LC v. Ray Bethers; and Custom Crushing, Inc., a Utah corporation : Brief of Appellant

Utah Court of Appeals


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**IN THE UTAH COURT OF APPEAL**

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| DON FITZGERALD, NORMA FITZGERALD, STEVEN FITZGERALD, and CLOVERLEAF RANCH, LC,<br>Plaintiffs/Appellees,<br>**vs.**<br><br>RAY BETHERS,<br>Defendant/Appellee,<br>CUSTOM CRUSHING, INC., a Utah corporation,<br>Defendant/Appellant. | **APPELLANT'S BRIEF**<br><br>Utah Court of Appeals Case No. 20030109 |
| RAY BETHERS,<br>Cross-Claimant/Counter Cross-Defendant/Appellee,<br><br>vs.<br><br>CUSTOM CRUSHING, INC., a Utah corporation,<br>Cross-Defendant/Counter Cross-Claimant/Appellant. | |

Appeal from the Third Judicial District Court, Summit County, Utah
Judge Robert K. Hilder Presiding


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## JURISDICTION

The Utah Supreme Court has original appellate jurisdiction of this appeal under the provisions of Utah Code Ann. § 78-2-2(3)(j). Pursuant to its authority under Utah Code Ann. § 78-2-2(4), on March 27, 2003, the Utah Supreme Court transferred the case to this Court. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

## ISSUES AND STANDARDS OF REVIEW

I. DID THE TRIAL COURT INCORRECTLY CONCLUDE THAT THERE WAS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING THE ENTRY OF SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT CUSTOM CRUSHING? (Issue preserved R. at 140-195, 216-223, 959-998.)

*Standard of Review*

> A motion for summary judgment should be granted only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. When reviewing a grant of summary judgment, [the Court] review[s] the trial court's conclusions of law for correctness. As such, "[the Court] consider[s] only whether [the trial court] correctly applied the law and correctly concluded that no disputed issues of material fact existed." [The Court] view[s] all facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party.

*Lovendahl v. Jordan School District*, 2002 UT 130, ¶13, 63 P.3d 705 (citations omitted).

II. DID THE TRIAL COURT INCORRECTLY CONCLUDE THAT MR. BETHERS HAD CONTINUING RIGHTS IN THE ORIGINAL LEASE AFTER IT WAS ASSIGNED TO CUSTOM CRUSHING? (Issue preserved R. at 158-163, 218-221, 416-422, 904-924.)

*Standard of Review*

> If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.

*Wagner v. Clifton*, 2002 UT 109, ¶12, 62 P.3d 440 (citations omitted). Additionally, whether a person is a party to a contract is a matter of contractual interpretation and may be interpreted as a matter of law. *Id.* ¶13.

III. DID THE TRIAL COURT CLEARLY ERR IN CONCLUDING THAT THE CUSTOM CRUSHING LEASE DID NOT SUPERSEDE THE ORIGINAL LEASE? (Issue preserved R. at 158-163, 218-221, 416-422, 904-924.)

*Standard of Review*

"Since the issue of whether a contract [has been superseded] is a factual question, the trial court's determination will be sustained on appeal if there is substantial evidence to support it." *Ringwood v. Foreign Autoworks, Inc*, 671 P.2d 182, 183 (Utah 1983).

IV. DID THE TRIAL COURT INCORRECTLY CONCLUDE THAT THE STATEMENTS OF THE PARTIES REGARDING A JOINT LITIGATION STRATEGY, IN AN EFFORT TO COMPROMISE CLAIMS AGAINST EACH OTHER, WERE NOT PROHIBITED BY RULE 408 OF THE UTAH RULES OF EVIDENCE? (Issue preserved R. at 603-607, 731-739, 741-744, 771-777, 855-859, 868-869, 873-874, 881.)

*Standard of Review*

"[W]hen [an] evidentiary ruling at issue is an independent legal issue and does not involve the balancing of factors, [the Courts] review the determination for correctness."

*State v. Whittle*, 1999 UT 96, ¶21, 989 P.2d 52 (citing *State v. Dunn*, 850 P.2d 1201, 1222 n.22 (Utah 1993)).

## DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Utah R. Civ. P. 56

> (a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> (d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah R. Evid. 408.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

This appeal is to review (1) an order denying cross motions for summary judgment dated September 5, 2001, entered by Judge Robert K. Hilder, Third District Court, (*see* R. at 228-229, a copy of the order is appended to this Brief as Exhibit A), and (2) the judgment entered on January 7, 2003, entered by Judge Robert K. Hilder, Third District Court, (see R. at 528-531, a copy of the judgment is appended to this Brief as Exhibit B).

### II. COURSE OF PROCEEDINGS

On February 10, 2000, Don Fitzgerald, Norma Fitzgerald, Steven Fitzgerald, and Cloverleaf Ranch, L.C. (hereinafter "the Fitzgeralds") filed a Complaint against Ray Bethers and Custom Crushing, Inc. (*See* R. at 1-38.) The Complaint sought to quiet title in certain property, a declaratory judgment, and damages for claims related to a gravel pit owned by the Fitzgeralds and leased to Custom Crushing. (*See id.*) Bethers answered the complaint and filed a cross-claim against Custom Crushing. (*See* R. at 52-65.) Custom Crushing answered the Fitzgeralds' claim (*see* R. at 46-51), and filed a cross-claim against Bethers. (*see* R. at 60-77.) [1]

On May 21, 2001, the Fitzgeralds filed a motion for summary judgment. (*See* R. at 91-139.) In answer, Custom Crushing also filed a motion for summary judgment. (*See* R. at 140-195.) After a hearing on the motion, the Court entered an order denying the

[1] The Fitzgeralds were permitted to amend their complaint, which they did on March 13, 2002. (*See* R. at 330-339.) On March 18, 2002, Custom Crushing answered the

cross-motions for summary judgment. (*See* Ex. A.)

A bench trial was held on July 9, 10, and 11, 2002. At the conclusion of the trial, the Court gave its oral decision ruling in favor of the Fitzgeralds in all material respects. (*See* R. at 945-955.) On October 25, 2002, the Court entered its Findings of Facts and Conclusions of Law (Findings and Conclusions). (*See* R. at 439-447. A copy of the Findings and Conclusions is appended as Exhibit C.) On January 6, 2003, the Court entered its Judgment and Order. (*See* Ex. B.) Custom Crushing filed its Notice of Appeal on February 5, 2003. (A copy of the Notice of Appeal is appended as Exhibit D.)

## III. STATEMENT OF RELEVANT FACTS

In 1986, the Fitzgeralds entered into a document designated as "Option for Purchase of Sand and Gravel" (Original Lease) with L. Clifton Read. (*See* Ex. C, ¶ 2; Trial Exhibit P-1. A copy of the Original Lease is appended to this Brief as Exhibit E.) The Original Lease gave Read the exclusive right to purchase sand, gravel, and road and dam building materials from property owned by the Fitzgeralds (the Property). (*See* Ex. C, ¶ 2; Ex. E at 1.) It originally was to run for a term from February 6, 1986 to February 6, 1992. (*See* Ex. E at 1; Ex C, ¶ 3.) The Original Lease also gave Read the option to extend the term of the Original Lease for two additional five-year terms. (*See* Ex. E at 1; Ex C, ¶ 3.) Accordingly, the first option period ran from February 6, 1992 to February 6, 1997, and the second option period ran from February 6, 1997 to February 6, 2002.

Read assigned his rights in the Original Lease to Ray Bethers in 1991 by a

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Amended Complaint. (*See* R. at 340-350.)

document entitled Purchase and Broker Agreement (Read/Bethers Assignment). (Ex. C, ¶ 6; Trial Exhibit P-2. A copy is appended to this Brief as Exhibit F.) Bethers exercised his option to extend the term of the Original Lease for the first option period. (*See* R. at 587-88, 660; Trial Exhibit P-3; Ex. C, ¶ 7.)

During the period that Read and Bethers held the rights to the property under the Original Lease, the Fitzgeralds received little, if any, royalty payments. (*See* R. at 585-87, 612-13.) In fact, although Read did extract rock and sell it during his time as lessee, Bethers did no additional extraction and sold only the stockpiled Materials left there by Read. (*See* R. at 587, 659, 672-73.)

In 1994, Custom Crushing approached the Fitzgeralds about the possibility of leasing the Property and beginning a commercial gravel pit operation at the site if necessary governmental approvals could be obtained. (*See* R. at 588, 618-21, 780.) The Fitzgeralds approved of the idea and told Custom Crushing they were agreeable to such an arrangement. (*See* R. at 588-89, 618-21, 780-81.) Based upon their statements, Custom Crushing began the expensive process of getting the necessary governmental approvals. (*See* R. at 589-90, 618-21, 782-83.) Custom Crushing paid for all of the expenses, totaling approximately $138,000, including attorney and expert fees, for approval of the annexation of the property into the Town of Francis and the approval of a conditional use permit. (*See* R. at 589-90, 618-21, 783-84.) Additionally, Custom Crushing paid for all of the expenses, totaling approximately $60,000, for the litigation and costs arising out of those approvals. (*See* R. at 589-90, 790-91.)

After the annexation and conditional use permit applications had been approved, Bethers began to assert his interest in the Property. (*See* R. at 623, 662-63, 786-87.) At that time, despite Custom Crushing's expenditure of significant resources, Custom Crushing still had no formal written agreement with the Fitzgeralds giving it any rights in the Property. (*See* R. at 622, 783.) The Fitzgeralds assured Custom Crushing that they could make satisfactory arrangements with Bethers to get him to relinquish his interest in the Property. (*See* R. at 623, 786-87.) However, when negotiations failed between the Fitzgeralds and Bethers, Custom Crushing took an active role in securing Bethers' rights. (*See* R. at 787.)

In May 1995, Bethers assigned his rights in the Original Lease to Custom Crushing in a document entitled Assignment of Option (Custom Crushing Assignment). (*See* Ex. C, ¶ 8; R. at 591; 663-64, 787; Trial Exhibit P-4. A copy of the Custom Crushing Assignment is appended to this Brief as Exhibit G.) The Custom Crushing Assignment provided in part that Bethers was entitled to a royalty of $.20 per ton of material extracted during "the term of 'The [Original Lease],'" payable in material only, with the right to payment expiring one year after the royalty accrued. (*See* Ex. C, ¶ 10; R. at 664-65, 787-89; Ex. G, ¶¶ 1-2.) Additionally, the Custom Crushing Assignment provided that Bethers was required to pay the outstanding balance due and owing MCM Engineering for certain services it had performed when Bethers had sought but had failed to receive land use approval from the County. (*See* R. at 818; Ex. G, ¶ 7.)

In June 1995, one month after Custom Crushing succeeded to Read's and Bethers'

interests, Custom Crushing entered into a document entitled "Lease Agreement" with the Fitzgeralds (Custom Crushing Lease). (*See* Ex. C, ¶ 14; R. at 594-95; Trial Exhibit P-5. A copy of the Custom Crushing Lease is appended to the Brief as Exhibit H.) While not explicitly mentioning the Original Lease, the Custom Crushing Lease gave Custom Crushing the exact same rights granted in the Original Lease. Custom Crushing was given the "exclusive right to possession of and removal of sand, gravel, and other rock product . . . from the Property." (Ex. H, ¶ 1; Ex. C, ¶ 14.) However, to make the transaction economically feasible and allow Custom Crushing to recapture the money expended by it for governmental approvals, the Custom Crushing Lease gave Custom Crushing the right to remove material from the Property until June 2005---three years longer than the final day of the second option period in the Original Lease. (R. at 595-96; Ex. H, ¶ 1.) Additionally, the Custom Crushing Lease provided that the Fitzgeralds were entitled to a twenty-six cent per ton royalty "until such time as Custom Crushing [was] no longer obligated to provide compensation to Ray Bethers." (R. at 597-98, 641-42; Ex. H, ¶ 1; Ex. C, ¶ 16.) The twenty-six cent royalty, however, was not to be paid on any product taken by Ray Bethers in payment of his royalty under the Custom Crushing Assignment. (R. at 793; Ex. H, ¶ 1.) Although the Fitzgeralds had originally agreed to accept twenty-five cents for their royalty under the Custom Crushing Lease, the Fitzgeralds requested a one cent increase in the royalty to allow them an amount of royalties to compensate them for the amounts removed by Bethers pursuant to the Custom Crushing Assignment. (*See* R. at 758-760, 793-94; Ex. H, ¶ 1.) At the time

Custom Crushing was no longer obligated to Ray Bethers, the Fitzgeralds were to be entitled to a heightened royalty of $.50 per ton. (*See* R. at 641-42, 794; Ex. H, ¶ 1; Ex. C, ¶ 16.)

After the execution of the Custom Crushing Lease, the Fitzgeralds and Custom Crushing performed pursuant to the terms of the Custom Crushing Lease, not the terms of the Original Lease. Custom Crushing paid the $.26 per ton royalty found in the Custom Crushing Lease to the Fitzgeralds. (*See* Ex. C, ¶ 25; R. at 607-11, 800; Trial Exhibits P-7, P-8, P-9.) Custom Crushing also delivered material to Ray Bethers pursuant to the Custom Crushing Assignment. (*See* R. at 674-681, 801-09, 818-26, 834; Trial Exhibits D-30, D-31, D-32, D-33; Ex. C, ¶ 28.) Surprisingly however, in February of 1997, the Fitzgeralds came to Custom Crushing and insisted that because they had not received a written notice to extend the Original Lease, Ray Bethers' rights to receive any additional royalties had ceased. (*See* R. at 599-600, 604-05, 800-01.) Accordingly, they asserted that Custom Crushing was no longer obligated to provide compensation to Ray Bethers. (*See* R. at 599-600, 604-05, 737, 800-01, 855.) They, therefore, demanded that Custom Crushing pay them the heightened royalty of $.50 per ton. (*See* R. at 599-600, 604-05, 737, 800-01, 855.) At the same time, Bethers continued to demand that he receive payment of his material royalty. (*See* R. at 599-600, 604-05, 737, 800-01, 855.) In fact, Bethers continued to receive materials in payment of his royalty after February 1997.

Despite Bethers agreement in the Custom Crushing Assignment, Bethers had failed to pay the bill owing to MCM Engineering. (*See* R. at 674-681, 801-09, 818-26,

834; Trial Exhibits D-30, D-31, D-32, D-33.) In 1997, MCM Engineering made demand upon Custom Crushing to pay the amounts owing and due to it from Bethers. (*See* R. at 674-81, 818-26; Trial Exhibit D-30.) In response, Custom Crushing brokered a deal in which MCM Engineering and Bethers agreed that Bethers was to sell a portion of his material royalty to Vic Byer, Byer was to pay Bethers for the material he picked-up, and Bethers was to pay MCM Engineering. (*See* R. at 677-81, 821-22; Trial Exhibit D-30.) However, after the first month under this deal, Bethers failed to pay MCM Engineering with that money. (*See* R. at 822-23.) Consequently, Byer began delivering the check to Custom Crushing, who would then deliver the amount to MCM Engineering. (*See* R. at 677-781, 822-23.) Despite this agreement, Custom Crushing also paid MCM Engineering an additional $1,600 to retire the account. (*See* R. at 823-25; Ex. C, ¶ 29.)

On January 28, 2000, Fitzgeralds filed this action against Ray Bethers and Custom Crushing. Although Bethers filed an answer and cross claimed against Custom Crushing, in May 2001 Bethers assigned his rights in his material royalty and his rights in this litigation to the Fitzgeralds. (*See* R. at 611-12; 685-88. Trial Exhibit P-10.) The Fitzgeralds sought the following relief in their Amended Complaint: (1) An order quieting title to the property in favor of the Fitzgeralds; (2) an order declaring that the Original Lease has expired and is null and void; (3) damages for the difference between the $.26 royalty paid and the $.50 royalty they claim is owed from February 6, 1997 to the present; (4) damages for failure to provide Bethers his royalty and an accounting; and (5) damages in unjust enrichment for the "reasonable value of the benefit received by

Custom Crushing." (*See* R. at 330-339.) Custom Crushing answered and filed a cross claim against Bethers asserting it be paid damages for Bethers' failure to remove the scales and for the Custom Crushing payments to MCM Engineering.

In August of 2001, the Fitzgeralds and Custom Crushing filed cross-motions for summary judgment. Although the critical facts were undisputed, the trial court refused to grant summary judgment, concluding that there were genuine issues of material fact. (*See* Ex. A.)

The matter was set for trial on July 9, 2002. During the course of the three-day bench trial, the Plaintiffs offered testimony by Norma Fitzgerald and by Sheldon Smith, former attorney for the Fitzgeralds, regarding discussions that the Fitzgeralds and Custom Crushing had had after the Fitzgeralds had indicated their intention to make claim on Custom Crushing for additional royalties. (*See* R. at 603-607, 731-739, 741-744, 771-777, 855-859, 868-869, 873-874, 881.) The discussions related to a joint litigation strategy that the Fitzgeralds and Custom Crushing might pursue in order to settle or compromise the claims that the parties had against each other. (*See id.*) Custom Crushing objected to the testimony as it was precluded by Rule 408 of the Utah Rules of Evidence. (*See id.*) The Court overruled the objections and allowed the evidence in. (*See id.*.)

On October 25, 2002, the Court entered its Findings of Fact and Conclusions of Law. (Findings & Conclusions, Ex. C.) The Findings and Conclusions provided in relevant part:

## FINDINGS OF FACT

. . . .

19. During the negotiation of the Lease Agreement, Plaintiffs and Custom Crushing agreed that if Bethers provided written notice to the Plaintiffs prior to February 6, 1997 to exercise the last option period, the [Original Lease] and compensation to Bethers would be extended to February 6, 2002.

. . . .

22. During the years of 1997 up to 2001, Custom Crushing and Plaintiffs worked together to determine the rights, if any, of Bethers to compensation under the 1986 Agreement.

23. In June 1999, Craig Smith, counsel to Custom Crushing, drafted a Complaint naming Custom Crushing and Ray Bethers as defendants seeking quiet title and a declaratory judgment to determine the rights, if any, of Bethers.

24. In July 1999, Craig Smith, counsel to Custom Crushing, prepared a contingency fee agreement wherein Craig Smith's firm and Sheldon Smith, counsel to Plaintiffs, would share a ten cents per ton royalty from "the date the Court determines the [1986] terminated and Mr. Bethers is not entitled to royalty, and run through February 6, 2002, the last date the [Original Lease] and all options would expire if all required notices had been given."

. . . .

## CONCLUSIONS OF LAW

1. Under the express terms of the [Original Lease], the agreement would terminate on February 6, 1997 if the last option was not exercised by Bethers.

2. The last option contained in the [Original Lease] which would have extended the term to February 6, 2002 was not exercised.

3. Without the required notice to exercise, the [Original Lease] expired under its own terms on February 6, 1997, and thereafter had no legal force

or effect.

Based upon those findings and conclusions, on January 6, 2003, the Court entered a judgment against Custom Crushing in the sum of $502,239.05. (*See* Ex. B.)

## SUMMARY OF ARGUMENT

The trial court incorrectly denied Custom Crushing's summary judgment. The trial court incorrectly concluded that the Original Lease was not superseded by the Custom Crushing Lease. Instead, the court concluded that there was an issue of fact when it accepted the Fitzgeralds' mistaken notion that the Original Lease survived the Custom Crushing Lease and that the obligation to Bethers' term depended upon Bethers exercise of an option he did not have.

At trial, the trial court incorrectly concluded that Bethers had a continuing right to exercise the option after the entry of the Custom Crushing Lease. As a matter of law, all rights in the Original Lease had passed to Custom Crushing in the Custom Crushing Assignment leaving Bethers with no rights. The trial court's incorrect conclusion undermined its remaining findings and conclusions and should, therefore, be reversed.

The trial court also clearly erred when it determined that the Custom Crushing Lease did not supersede the Original Lease. The principles of contractual interpretation make clear that courts must first review the plain language of an agreement to determine the parties' intentions. Only if the language is susceptible to reasonable alternative interpretations can the Court review extrinsic evidence. In this case, the contracts were not ambiguous about the parties' intentions with regard to the Custom Crushing Lease. It

was clearly intended to supersede the Original Lease. Accordingly, it was incorrect for the trial court to rely on extrinsic evidence to determine that the Original Lease survived. Because the Custom Crushing Lease superseded the Original Lease, the obligation to was necessary to extend the Original Lease—it had already been done. Additionally, Bethers did not have any right to extend the Original Option since he had assigned his rights away in the Original Lease.

Finally, the trial court incorrectly permitted evidence to be presented to the trier of fact of discussions and documents derived from settlement negotiations. The discussions and documents, however, clearly derived after a dispute arose, and while the parties were attempting to resolve that dispute. The trial court's error was substantial and prejudicial as the trial court specifically relied upon this improperly admitted evidence in its finding as to Custom Crushing's intent when it entered the Custom Crushing Lease.

## ARGUMENT

### I. THE TRIAL COURT INCORRECTLY CONCLUDED THAT THERE WAS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING THE ENTRY OF SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT CUSTOM CRUSHING

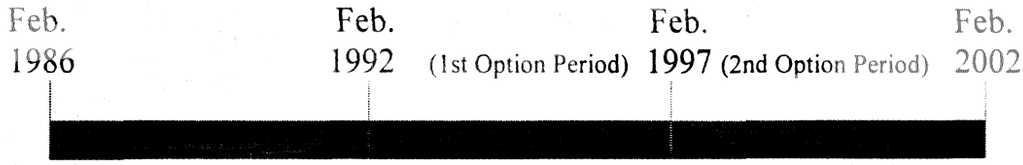
> A motion for summary judgment should be granted only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. When reviewing a grant of summary judgment, [the Court] review[s] the trial court's conclusions of law for correctness. As such, "[the Court] consider[s] only whether [the trial court] correctly applied the law and correctly concluded that no disputed issues of material fact existed." [The Court] view[s] all facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party.

*Lovendahl v. Jordan School District*, 2002 UT 130, ¶13, 63 P.3d 705 (citations omitted).

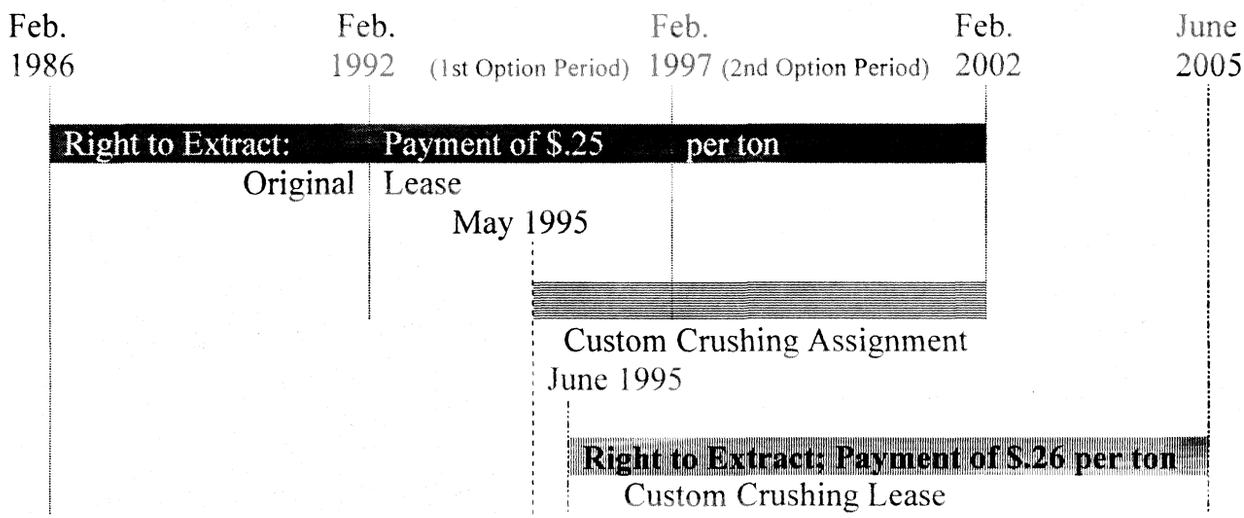
In this case, prior to trial, the parties filed cross-motions for summary judgment. The sole argument on the summary judgment motions was whether Custom Crushing's obligation to provide compensation to Bethers under the Custom Crushing Assignment terminated when neither Bethers nor Custom Crushing extended the term of the Original Lease. (*See* R. at 106; 206-07.)

In order for the Court to understand the relevant arguments, a more thorough explanation of the documents at issue in this case is necessary. As described above, the Fitzgeralds agreed in the Custom Crushing Lease to a twenty-six cent per ton royalty on materials "produced and sold on the Property until such time as Custom Crushing is no longer obligated to provide compensation to Ray Bethers." (Ex. H, ¶ 1.) Once Custom Crushing was no longer obligated to provide compensation to Ray Bethers, the royalty to the Fitzgeralds was to increase to fifty cents per ton. Obviously, because the Custom Crushing Lease tied the enhanced royalty payments to Custom Crushing's obligation to provide compensation to Bethers, the Court was required to look to the Custom Crushing Assignment, which defines Custom Crushing's obligation.

The Custom Crushing Assignment declares that Bethers is to receive his royalty "during the term of 'The [Original Lease]." (Ex. G, ¶ 2.) As discussed above, the Original Lease had a six year term with two option periods. (*See* Ex. E at 1.) The various time periods created by the Original Lease can be represented as follows:




At the time of the Custom Crushing Assignment, the Original Lease was in the first option period, which was set to terminate on February 6, 1997. (*See* R. at 587-88; 660; Trial Exhibit P-3; Ex. C, ¶ 7.) One month after the Custom Crushing Assignment was entered, Custom Crushing and the Fitzgeralds entered the Custom Crushing Lease. (*See* Ex. C, ¶ 14; R. at 594-95; Ex. H.) The relationships of the various agreements can be represented graphically as follows:




The question presented in this case was whether the parties to the Custom Crushing Assignment understood that Custom Crushing was to pay the royalty (1) upon the termination of the Original Lease (at any time), (2) until the last day of the first option period, or (3) until the last day of the last option period, i.e., February 7, 2002.

The undisputed evidence presented with the summary judgment motions established that the parties intended that the last day of the last option period, February 6, 2002, was the intended end of the term if the second option of the Original Lease were exercised. (*See* R. at 203.) The Fitzgeralds were clear: "There is no dispute that the royalties to be paid to Bethers pursuant to the Custom Crushing Assignment would continue through February 6, 2002, provided that the [second] option was exercised to extend the [Original Lease] through that date." (*Id.*) Their sole argument was that "the [second] option was never exercised." (*Id.*) The Fitzgerald's argument that the second "option was never exercised" hinged on their mistaken belief that the Original Lease "provid[ed] that in order to exercise any of the options to extend the term of [the Original Lease], it is required that notice be given to the Fitzgeralds in writing and prior to the expiration of the prior option period." (R. at 206-07.) Because they claimed no such notice had been given, they argued that the Original Lease was not extended and, therefore, terminated on February 6, 1997. Hence, they concluded, Custom Crushing was no longer obligated to pay Bethers the royalty.

This argument, however, fails as a matter of law. There was no dispute that the Custom Crushing Assignment gave Custom Crushing all of Bethers' rights in the Original Lease. (*See* Ex. G, Recitals ¶ C; Ex. G, ¶ 1.) Under the Original Lease, the Fitzgeralds offered to extend the exclusive right to purchase sand, gravel, and building materials from February 6, 1997, to February 6, 2002, if Custom Crushing, as Read's and Bether's successor-in-interest, would, by written notice, exercise the option before

February 6, 1997. (*See* Ex. E at 1.) Custom Crushing's predecessor-in-interest gave consideration for that promise. Accordingly, the Original Lease not only gave Custom Crushing a lease interest in the property but also gave Custom Crushing an option to extend the lease. *See Coulter & Smith, Ltd. v. Russsell*, 966 P.2d 852, 859 (Utah 1998) ("An option contract is a continuing offer, supported by consideration, which the promisor is bound to keep open.") In this case, the option contained two contractual obligations: (1) the Fitzgeralds were obligated to leave open their offer to lease the property to Custom Crushing for the period February 1997 to February 2002 until February 1997; and (2) Custom Crushing was obligated to provide written notice to accept the offer.

The Fitzgeralds argue the Original Lease was not extended because nobody provided them written notice to accept the offer to extend the Original Lease into the second option period. This, however, is contrary to the law. Those two contractual duties were discharged when the Fitzgeralds and Custom Crushing entered into the Custom Crushing Lease. It is axiomatic that a contractual duty is discharged by the entry of a substituted contract. *Horman v. Gordon*, 740 P.2d 1346, 1351 (Utah Ct. App. 1987) (holding "substitution of a contract which is accepted by the obligee in satisfaction of the original duty discharges the original duty").

In this case, there was a substituted contract that discharged Custom Crushing's duty to provide written notice to extend the Original Lease. A contract is substituted for another when it "incorporates all or part of an earlier agreement." *Ringwood v. Foreign*

*Autoworks, Inc.*, 671 P.2d 182, 183 n.2 (Utah 1983). In this case, it is clear that the Custom Crushing Lease substituted for the Original Lease. The Restatement (Second) of Contracts § 279 provides the following illustration which is particularly relevant to this case.

> 2. A and B make a contract under which A promises to build on a designated spot a building, for which B promises to pay $100,000. Later, before this contract is performed, A and B make a new contract under which A is to build on the same spot a different building for which B is to pay $200,000. The new contract is a substituted contract and the duties of A and B under the original contract are discharged.[2]

This case is analogous. The undisputed evidence showed that the Fitzgeralds promised in the Original Lease to provide material from certain property to Custom Crushing, as a successor-in-interest to Read, at a certain royalty rate from February 6, 1997 to February 6, 2002, if Custom Crushing provided written notice of its intent to accept the offer before February 6, 1997. (*See* R. at 150; 203.) Before the Fitzgeralds' offer was accepted, the parties entered into a lease in which the Fitzgeralds agreed to provide the same materials from the same property specified in the Original Lease. (Ex. E. at 1; Ex. G, Recitals ¶¶ A, W; Ex. G ¶ 1.) However, the Fitzgeralds agreed to a longer term and asked for a higher royalty rate for the exact same material they were obligated to supply under the Original Lease. (Ex. E at 2; Ex. G, ¶ 1.) After the entry of the Custom Crushing Lease, it is undisputed that the Fitzgeralds received the twenty-six cent

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[2] This Court has explicitly relied upon section 279 of the Restatement (Second) of Contracts in deciding other cases. *See Horman v. Gordon*, 740 P.2d 1346, 1350-51 (Utah Ct. App. 1987).

royalty payment under the Custom Crushing Lease and the parties performed pursuant to that agreement. (*See* R. at 975 ("The third critical fact is that after the lease agreement was entered, the Fitzgeralds only received the royalty provided for under the lease agreement, not the original option); R. at 992 ("I think it was that only, that the Fitzgeralds only received the payment under the lease. They didn't receive it under the option. There's no question about that. . ..").)

The Fitzgeralds, therefore, cannot dispute that the Custom Crushing Lease substituted for the Original Lease. Hence, as a matter of law, Custom Crushing's contractual obligation to provide written notice to extend the lease was discharged. *Horman v. Gordon*, 740 P.2d 1346, 1351 (Utah Ct. App. 1987) (holding "substitution of a contract which is accepted by the obligee in satisfaction of the original duty discharges the original duty"). There was no longer an obligation to provide written notice to extend the Original Lease.

As a result of these dispositive legal and factual issues, Custom Crushing was entitled to judgment as a matter of law that its obligation to Bethers continued. As described above, all the parties agreed that if Custom Crushing had exercised its right to extend the Original Lease through the second option period, Custom Crushing's obligation to pay Bethers the royalty would have continued. (*See* R. at 203 ("There is no dispute that the royalties to be paid to Bethers pursuant to the Custom Crushing Assignment would continue through February 6, 2002, provided that the [second] option was exercised to extend the [Original Lease] through that date.") The Fitzgeralds' sole

argument was that "the [second] option was never exercised," (*id.*), because notice had not been given "to the Fitzgeralds in writing," (*id.* at 207.) Fitzgeralds made this argument very clearly in the hearing on the motions for summary judgment:

> THE COURT: I think that's undisputed. The argument is that the lease agreement really substituted for or took the place of the option so it would have been a futile act. I mean I think that's why we're here and so I mean, it is not disputed there was no formal renewal of the option or exercise of the option, it is disputed that there was in fact a continuing agreement to take the gravel, etc. Do you agree with that?
>
> MR. SMITH: I agree with that, I think that is the dispute that's before the Court and I will just move – from the fact, it sounds like the Court has a handle on the facts. It does come down to the issue of whether the lease really did exercise the option to extend the option agreement . . .."

(R. at 963.) As a matter of law, entering the substituted contract discharged Custom Crushing of providing the written notice and extended the terms of the Original Lease through 2005. By entering into the Custom Crushing Lease that provided Custom Crushing with access to the property for an additional three years, Custom Crushing accepted the offer to extend the Original Lease through the second option period. Thus, although the Original Lease was superseded by the Custom Crushing Lease---hence, eliminating the need to provide notice of extension—Custom Crushing's obligation to Ray Bethers did not terminate—Custom Crushing had extended its rights to the Fitzgeralds' property past February 6, 1997, the expiration of the first option period of the Original Lease. Accordingly, Custom Crushing's obligation to Mr. Bethers did terminate on February 6, 1997, but continued until at least February 6, 2002.

Given these undisputed material facts and the law, the trial court incorrectly denied the motion for summary judgment for Custom Crushing. Custom Crushing therefore respectfully requests that this Court reverse the denial of the motion for summary judgment and remand to the trial court for an entry of summary judgment in favor of Custom Crushing.

## II. THE TRIAL COURT INCORRECTLY CONCLUDED THAT MR. BETHERS HAD CONTINUING RIGHTS IN THE ORIGINAL LEASE AFTER IT WAS ASSIGNED TO CUSTOM CRUSHING

Even if the trial court were not incorrect in refusing to grant summary judgment, the trial court also made several reversible errors during the course of the three-day trial. The first and most significant was that it incorrectly concluded that Mr. Bethers had continuing rights in the Original Lease after it was assigned to Custom Crushing.

Utah law provides that "[a]n assignment is the transfer of rights" from one party to another. *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991). An assignment is simply a contract that

> is interpreted according to the rules of contract construction. If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement. A court may only consider extrinsic evidence if, after careful consideration, the contract language is ambiguous or uncertain. A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of "uncertain meanings of terms, missing terms, or other facial deficiencies." Whether ambiguity exists in a contract is a question of law.

*Id.* at 108 (quoting *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983) (other citations omitted)). Additionally, "[t]here is a presumption that a lease has

been assigned, when there is a person other than the lessee in possession of the leased premises, who is paying rent to the lessor." *Jensen v. O.K. Investment Corp.*, 29 Utah 2d 231, 235, 507 P.2d 713, 716 (1973).

In this case, the trial court determined that the Fitzgeralds were entitled to the heightened royalties beginning February 6, 1997, based solely on its determination that Bethers did not exercise the right to extend the Original Lease into the second option period. The conclusions of the trial court are explicit.

> 1. Under the express terms of the [Original Lease], the agreement would terminate on February 6, 1997 if the last option was not exercised **by Bethers**.
>
> 2. The last option contained in the [Original Lease] which would have extended the term to February 6, 2002 was not exercised.
>
> 3. Without the required notice to exercise, the [Original Lease] expired under its own terms on February 6, 1997, and thereafter had no legal force or effect.

(*See* Ex. C, R. at 443-44 (emphasis added).)

These conclusions imply certain findings: (1) that the Original Lease survived the Custom Crushing Lease and (2) that Bethers still had a continuing right in the Original Lease to extend the Original Lease into the second option period. However, as discussed above in part I, and as will be more thoroughly discussed in part III below, the Original Lease did not survive the Custom Crushing Lease. Even if it had survived, the trial court incorrectly concluded that Bethers had continuing rights in the Original Lease.

The Custom Crushing Assignment stated that Bethers "desire[d] to assign all of

his rights to the Property under the '[Original Lease]' to Custom Crushing, and Custom Crushing desire[d] to accept such assignment." (Ex. G, Recitals C.) Consequently, the agreement provided that Bethers "forever assign[ed] to Custom Crushing all right, title and interest in and to the Property and to all sand, gravel, aggregate or other rock or earth products produced on or from the Property." (Ex. G ¶ 1.) Additionally, the agreement provided that "Bethers shall have no right to operate any sand and gravel operation on the Property, and has expressly assigned any such right to Custom Crushing." (Ex. G ¶ 8.) Thus, the plain language of the terms of the Custom Crushing Assignment provided that all rights under the Original Lease were assigned to Custom Crushing.[3]

There is no question that the unambiguous language of the contract provides that Ray Bethers had passed all of his rights in the Original Lease to Custom Crushing. Additionally, the undisputed evidence at trial was that Custom Crushing paid the royalties from the time of its entry on the land, establishing the presumption that Custom Crushing had been assigned the lease. (R. at 607-09, 796-800; Trial Ex. P-7; D-41.) As a matter of law, therefore, Bethers had assigned the entire contract to Custom Crushing.

Because Bethers had assigned the Original Lease, the option to renew was

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[3] All parties who testified at trial agreed. Norma Fitzgerald very clearly understood that once Bethers and Custom Crushing entered into the Custom Crushing Assignment, Custom Crushing had all the rights under the Original Lease. (*See* R. at 595, 630-36.) Bethers understood that he was simply assigning the Original Lease to Custom Crushing. (*See* R. at 664.) Sheldon Smith, attorney for the Fitzgeralds, understood that the Custom Crushing Assignment gave Custom Crushing the rights Bethers had in the Original Lease. (*See* R. at 723-724.) Steve Zabriskie, president of Custom Crushing, understood that Custom Crushing was receiving Bethers' rights in the Original Lease. (*See* R. at

transferred to Custom Crushing with all of its attending benefits and burdens.

> A provision in a lease giving the lessee the option to extend or renew the lease creates only a contractual right. It does not transfer any interest in the land until the option is exercised. However, when the option is exercised the covenant to renew ceases to be merely personal and runs with the land. **The legal successors of the lessee as well as of the lessor are entitled to the benefits, and, are burdened with the duties and obligations, which the covenant conferred and imposed on the original parties.**

*Jensen*, 29 Utah 2d at 236, 507 P.2d at 716 (quoting *Cicinelli v. Twasaki*, 170 Cal. App. 2d 58, 338 P.2d 1005, 1009 (1959) (citations omitted)) (emphasis added). Accordingly, Bethers no longer had a right to exercise the option, because it had passed to Custom Crushing. "One of the most basic principles of contract law is that, as a general rule, only parties to the contract may enforce the rights and obligations created by the contract." *Wagner v. Clifton,* 2002 UT 109, ¶13, 62 P.3d 440.

The trial court, thus, incorrectly concluded that "[u]nder the express terms of the [Original Lease], the agreement would terminate on February 6, 1997 if the last option was not exercised by Bethers." (Ex. C, R. at 443.) Bethers could not have exercised the option since he was no longer a party to the Original Lease.

This incorrect conclusion undermined the trial court's remaining conclusions and judgments. As indicated in the language of the Conclusions of Law, the remaining conclusions, and ultimately the judgment, were premised entirely on the trial court's conclusion that Bethers had failed to exercise the second option under the Original Lease. The third and fourth conclusions of law determined that because the option had not been

exercised in writing by Bethers, "the [Original Lease] expired under its own terms on February 6, 1997, and thereafter had no legal force or effect." (Ex. C, R. at 444.) Consequently, the trial court held that "[a]fter February 6, 1997, Custom Crushing was no longer obligated to provide compensation to Bethers." (*Id.*)

Given that Bethers had assigned his rights in the Original Lease to Custom Crushing, however, Bethers had neither the right nor the power to extend the option. Therefore, the trial court incorrectly concluded that the Original Lease could only be extended by written notice from Bethers. Accordingly, Custom Crushing respectfully requests that the Court reverse the judgment and remand for entry of judgment in favor of Custom Crushing.

## III. THE TRIAL COURT CLEARLY ERRED IN FINDING THAT THE CUSTOM CRUSHING LEASE DID NOT SUPERSEDE THE ORIGINAL LEASE

As discussed above, the second implicit ruling found in the trial court's conclusions of law is that the Original Lease survived the entry of the Custom Crushing Lease. The language found in paragraph 19 of the Findings of Fact supports this understanding of the trial court's conclusions.

> 19. During the negotiation of the Lease Agreement, Plaintiffs and Custom Crushing agreed that if Bethers provided written notice to the Plaintiffs prior to February 6, 1997 to exercise the last option period, the [Original Lease] and compensation to Bethers would be extended to February 6, 2002.

(Ex. C, R. at 442.) In other words, the trial court found that the parties did not intend to supersede the Original Lease with the Custom Crushing Lease, that the Original Lease

still survived the Custom Crushing Lease, and that Bethers had a continuing interest in the Original Lease that could only be extended by submission of a written notice.

"Since the issue of whether a contract [has been superseded] is a factual question, the trial court's determination will be sustained on appeal if there is substantial evidence to support it." *Ringwood v. Foreign Autoworks, Inc*, 671 P.2d 182, 183 (Utah 1983). A finding that is so lacking in support as to be against the clear weight of the evidence is not supported by substantial evidence. *See Young v. Young,* 979 P.2d 338, 342 (Utah 1999).

*A. The Evidence*

Pursuant to Rule 24(a)(9) of the Utah Rules of Appellate Procedure, Custom Crushing marshals the evidence supporting the trial court's finding that the Custom Crushing Lease did not supersede the Original Lease.

The following evidence was adduced that could be construed to support the trial court's findings. First, two witnesses, Norma Fitzgerald and Sheldon Smith, testified that certain statements were made during the negotiations of the Custom Crushing Lease. The witnesses testified that during the negotiations of the Custom Crushing Lease, Custom Crushing expressed that it wanted a new lease agreement to give it the right to lease the property through 2005 in the event that the Original Lease agreement was not extended into the second option period. (*See* R. at 595-96 ("He wanted this (inaudible) through what the—if the option was not renewed at that time, then he needed it to covered with this."); R. at 636-38, 724-25.) Additionally, they stated that the intent of entering into the Custom Crushing Lease was to give Custom Crushing three more years to lease the

property beyond the last date of the end of the second option period found in the Original Lease. (*See* R. at 595 ("[T]here was still a period of time that he didn't have a contract so he wanted this to fill in for when this [expired]."); R. at 636-38, 724-25.) They also testified that Custom Crushing had said that the Original Lease would not be extended if Ray Bethers did not extend the option. (*See* R. at 597, 643, 726.) The witnesses further testified that Custom Crushing had stated that it would not renew the term on the Original Lease to extend it into the second option period. (*See* R. at 596-97; 726.) Also, the witnesses testified that Custom Crushing said that it would rather pay the Fitzgeralds than Ray Bethers. (*See* R. at 597, 725.) Accordingly, the witnesses testified that they understood that the agreement provided that "[w]hen Ray Bethers was no longer in and if he didn't renew the option February 6, 1997 he was out." (R. at 598.)

After the Custom Crushing Lease had been signed, the parties performed pursuant to the Custom Crushing Lease. Ms. Fitzgerald testified, however, that she believed that the Original Lease continued to run concurrently with the Custom Crushing Lease. (*See* R. at 639-40.)

Ms. Fitzgerald testified that she had gone to Custom Crushing on February 7, 1997, and had said that the Original Lease had not been renewed and demanded the $.50 per ton royalty. (*See* R. at 600.) Sheldon Smith testified that he had spoken to Craig Smith, attorney for Custom Crushing, and that Craig Smith had said that he had been waiting for the day that they could start paying the Fitzgeralds their royalty. (*See* R. at 158-59.) Additionally, Sheldon Smith testified that Craig Smith had stated that he was

pleased to learn that Ray Bethers was no longer claiming an interest in the pit and that he had suggested placing money in escrow until a determination could be made with respect to the parties respective rights.[4] (R. at 731.) Although Custom Crushing refused to pay when approached, the witnesses testified that in certain meetings held after that date, the Fitzgeralds and Custom Crushing entered into a joint strategy to eliminate Ray Bethers claims. (R. at 604, 732-44.) Those efforts included attempting to get Bethers to waive his claim in writing (R. at 732), a notice provision (R. at 735), filing a joint lawsuit (R. at 735-44), and mediation (R. at 743). Finally, Sheldon Smith testified that the first time he had heard that Custom Crushing claimed that the Custom Crushing Lease superseded the Original Lease was when Custom Crushing filed a motion for summary judgment. (R. at 746-48.)

*B. The Evidence Does Not Support the Trial Court's Finding*

As discussed at length in section I above, a contract is substituted for another when it "incorporates all or part of an earlier agreement." *Ringwood v. Foreign Autoworks, Inc.*, 671 P.2d 182, 183 n.2 (Utah 1983). The question of whether a contract substitutes for another "depends upon the intent of the parties." *Id.* at 183. "In determining whether an agreement was intended to supersede a prior agreement, a court

[4] Custom Crushing objected to this evidence and believes that it was inadmissible to determine the intention of the parties because these were settlement negotiations. This is the subject of the fourth issue on appeal and the substantive matters will be dealt with in part IV. Custom Crushing only notes this evidence as it is required under the marshalling doctrine but does not waive its later arguments.

may consider extrinsic evidence as to the circumstances of the transaction, including the purpose for which the contested agreement was made." *Id.*

However, the controlling principle of determining contracting parties' intentions with respect to a contract is clear:

> "If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." Whether the contract itself is ambiguous is also a question of law. An ambiguity exists if the contract provision is susceptible to more than one reasonable interpretation.

*Wagner v. Clifton*, 2002 UT 109, ¶12, 62 P.3d 440 (quoting *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶19, 54 P.3d 1139) (other citations omitted).

As indicated above, the factual findings implicitly indicate that the trial court found that in entering the Custom Crushing Lease the parties did not intend to supersede the Original Lease with the Custom Crushing Lease, that the Original Lease still survived the Custom Crushing Lease,[5] and that Bethers had a continuing interest in the Original Lease that could only be extended by submission of a written notice.

What is critical to understand is that for the trial court to have made such a finding, it was required first to determine that the contractual language was ambiguous. Nowhere in the Custom Crushing Lease does it state that the obligation to Ray Bethers continued only if he supplied written notice to extend the Original Lease. As described above, in the Custom Crushing Lease, the Fitzgeralds agreed to a twenty-six cent per ton

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[5] This implicit finding is closely allied with the first implicit finding; they are,

royalty on materials "produced and sold on the Property until such time as Custom Crushing is no longer obligated to provide compensation to Ray Bethers." (Ex. H, ¶ 1.) Once Custom Crushing was no longer obligated to provide compensation to Ray Bethers, the royalty to the Fitzgeralds was to increase to fifty cents per ton.

The Custom Crushing Assignment declares that Bethers is to receive his royalty "during the term of 'The [Original Lease].'" (Ex. G, ¶ 2.) As discussed above, the Original Lease had a six year term with two option periods. (*See* Ex. E at 1.) In order to find ambiguity, then, the trial court was required to find that "term of 'The [Original Lease]'" was ambiguous by reviewing the contractual language and determining that the language was susceptible to more than one reasonable interpretation.

Although it never made such a finding about the ambiguity of the contract, the trial court's findings and conclusion implicitly do so. Such a finding, however, cannot legitimately be made. A review of the Custom Crushing Assignment language makes clear that "term of 'The [Original Lease]" meant the entire term of the Original Lease, including the second option period. (*See* Ex. G.) Even if the Custom Crushing Assignment language were not clear, all of the parties who testified at trial testified that they understood that the "term of 'The [Original Lease]" to mean through the entire term of the Original Lease, including the second option period. (R. at 596-97, 634-35.)

Thus, there was no dispute in the evidence about the meaning of any language in the contract. Rather, the dispute was the effect the parties understood the Custom

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consequently, discussed together.

Crushing Lease to have on the Original Lease: i.e., did the Custom Crushing Lease supersede the Original Lease or did the Original Lease continue to exist after the Custom Crushing Lease was entered?

1. The Intent of the Parties was to Supersede the Original Lease

In order for the Court to find that the parties agreed that Bethers would have the right to extend the Original Lease, the Court would have had to conclude that the parties intended for the Custom Crushing Lease and the Original Lease to exist concurrently. While it is true Norma Fitzgerald testified that she understood that the two leases existed concurrently, the evidence establishes without question that her statement of belief is simply unsupported and irrelevant.

First, as discussed in section I *supra*, there is no question that in reviewing the four corners of the Custom Crushing Lease and the Original Lease, the Custom Crushing Lease was intended to completely supersede the Original Lease. The Fitzgeralds agreed in the Original Lease to provide material from certain property to its lessee from 1986 to 1992. (*See* Ex. E at 1.) The Original Lease also gave the lessee the option to extend the term of the Original Lease for two additional five-year terms until 2002. (*See* Ex. E at 1.) The Original Lease provided that, in exchange for the right to remove material, the lessee would be required to pay the Fitzgeralds a royalty. (Ex. E at 2.)

After Custom Crushing was assigned all of the rights in the Original Lease, but prior to the expiration of the first option period under that lease, Custom Crushing and the Fitzgeralds entered a new lease agreement. The Fitzgeralds agreed to a term that

provided for extraction of material until 2005 and asked for a higher royalty rate for the exact same material they were obligated to supply under the Original Lease. (Ex. E at 2; Ex. G, ¶ 1.)

This review of the four corners of the document reveals that there is no ambiguity. The Custom Crushing Lease superseded the Original Lease. As a matter of law, then, the trial court was precluded from considering any of the extrinsic evidence about whether the parties believed that the Original Lease existed concurrently with the Custom Crushing Lease. Accordingly, all of the evidence identified in part III.A above was irrelevant, and the trial court erred in allowing it.

This also makes any further discussion about what the parties intended with respect to the obligation of Ray Bethers irrelevant. As noted in part I, a contractual duty is discharged by the entry of a substituted contract. *Horman v. Gordon*, 740 P.2d 1346, 1351 (Utah Ct. App. 1987) (holding "substitution of a contract which is accepted by the obligee in satisfaction of the original duty discharges the original duty"). Because the Custom Crushing Lease discharged the obligation to extend the Original Lease, the condition precedent had been met for the obligation to Bethers to continue. All of the parties agreed that, if Bethers, or anyone in his place, had extended the term of the Original Lease, Custom Crushing's obligation to Bethers would have continued. (R. at 596-97, 634-35.) Since the Custom Crushing Lease had extended the right of Custom Crushing to remove the material through 2002, the parties had, in effect, extended the term of the Original Lease. Consequently, Custom Crushing's obligation to Ray Bethers

continued.

The trial court, however, leap-frogged this problem by finding that the parties had agreed during negotiations, that, in order for the obligation to Bethers to continue, Bethers himself had to extend the Original Lease by written notice only. Not only is this finding inconsistent with the integration clause found in the Custom Crushing Lease (*see* Ex. G, ¶12), but it is also inconsistent with the rules of contractual interpretation. Before the trial court could have properly considered extrinsic evidence in order to make such a determination, it should have first determined that the Fitzgeralds had demonstrated an ambiguity in the contract language susceptible to a "reasonable" alternative construction.

The Fitzgeralds could point to no ambiguous contractual language nor could they point to a reasonable alternative construction. As discussed above, for the trial court to accept such an argument, it had to make the following unreasonable determinations:

- contrary to long-established law, Bethers had continuing rights in a lease that all parties agreed had been completely assigned to another party;
- despite the fact that parties had performed only under the Custom Crushing Lease since its entry, the Fitzgeralds and Custom Crushing were still performing under the Original Lease as well; and
- a party was required to submit a written notice to extend a right to obtain material it was already entitled to under a separate agreement.

Even if the trial court could consider such extrinsic evidence in the absence of any ambiguity, all such evidence could possibly reveal was that the parties understood that the Custom Crushing Lease superseded the Original Lease. All of the parties testified that the intention of the parties was to give Custom Crushing the ability to have the right to extract gravel until the year 2005. (*See* R. at 595 ("[There was still a period of time

that he didn't have a contract so he wanted this to fill in for when this [expired]."); R. at 636-38, 724-25.) All of the parties testified that, after the entry of the Custom Crushing Lease, Custom Crushing paid the twenty-six-cent-per-ton royalty due under the Custom Crushing Lease, and that no one intended for Custom Crushing to be required to pay the twenty-five cent royalty under the Original Lease. (R. at 607-11, Trial Exs. P-7, P-8, P-9; R. at 639[6].) In fact, there is no dispute that the Fitzgeralds understood that the parties were all performing pursuant to the Custom Crushing Lease, not the Original Lease, after the Custom Crushing Lease was signed. (*See* R. at 635-38.)[7]

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[6] Q So did you get two royalties during the period?
A No.
Q What did you get?
A Twenty-six cents a ton.
Q And that was under which lease?
A Steve's lease.
(R. at 639.)

[7] Q Okay. And he came to you and he said, "I've got these rights, I want to enter a new lease." Is that accurate?
A Yes.
Q And what did he want to do? Why did he want to enter a new lease?
A Because he needed to be protected and because he'd offered us more money and he wanted to make a new agreement.
. . . .
Q And he wanted to have the full ten years to remove gravel from the pit; is that right?
A And he communicated that to you?
Q Yes.
. . . .
Q He did communicate to you that he wanted another deal, right?
A Yes, he did.
Q He wanted a new lease?
A Yes, he wanted a new lease.

The trial court, therefore, could only find that the Custom Crushing Lease substituted for the Original Lease. Accordingly, it clearly erred.[8]

2. Bethers Did Not Have Rights in the Original Lease

As discussed in section II *supra*, because Bethers assigned his rights to Custom Crushing in the Custom Crushing Assignment, Bethers could not have had continuing rights in the Original Lease. As with the discussion in part III.B.1, above, in order for the trial court to make the determination that Bethers' rights in the Original Lease continued, the court must have made the initial legal conclusion that the documents were ambiguous as to Bethers' continuing interests in the Original Lease.

However, as discussed above, a review of the explicit contractual language, which the trial court should have first looked to under standard contract interpretation

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Q So what did you do?
A Well, he'd offered us 50 cents and we said we'd do that and we agreed to go with him to make a contract.
Q So you entered the lease. And how long was the lease?
A Steve's agreement?
Q Yes.
A I guess it goes to the end of the conditional use, 1995 [sic: 2005].
(R. at 636-38.)

[8] The absurdity of the trial court's finding is illustrated by the following example. Suppose a person had entered into an agreement to lease a house for one year with subsequent options to extend the lease for up to four more years by written notice. After leasing the house for six months the person decides that he likes the house and is sure he will be in the area for several more years. Consequently, he approaches the homeowner and enters into a new lease for five years for a slightly higher rent rate. Under the trial court's analysis, if the landlord came to the lessee and demanded that he vacate the house for failure to submit written notice after a year had passed, the landlord would be perfectly within his rights.

principles, establishes without question that Bethers had assigned all of his rights to Custom Crushing. (*See* discussion *supra,* part I.) As a result, Bethers did not have legal authority to exercise any option under the Original Lease.

Given a review of the unambiguous contractual language, the trial court was precluded from looking at extrinsic evidence to determine whether the parties believed that Bethers had any continuing rights in the Original Lease. The trial court, therefore, erred when it looked to the evidence of intention outside of the scope of the contractual language to determine that the parties had agreed that Bethers could exercise the option at issue.

Even looking at extrinsic evidence, however, it is clear that the parties understood that all of Bethers' rights had been assigned to Custom Crushing. Norma Fitzgerald had testified that she understood that once Bethers and Custom Crushing entered into the Custom Crushing Assignment, Custom Crushing had all the rights under the Original Lease. (*See* R. at 595, 630-36.)[9] She testified that Bethers understood that he was simply

---

[9] Q Okay. Now, what did you believe that the assignment gave Custom Crushing?
A The assignment gave him the same thing that it had given Cliff [Read] and had given Ray Bethers.
Q And what was that?
A Had the right to crush.
Q Did anyone else have the right to come in and crush?
A No.
Q So, you understood that Custom Crushing just took over Ray Bethers' rights? You understood that, right?
A If he got that, yes, he did.

assigning the Original Lease to Custom Crushing. (*See* R. at 664.) Sheldon Smith understood that the Custom Crushing Assignment gave Custom Crushing the rights Bethers had had in the Original Lease. (*See* R. at 723-724, 763-64.)[10] Steve Zabriskie, president of Custom Crushing, understood that Custom Crushing was receiving Bethers' rights in the Original Lease. (*See* R. at 787-88.) Thus, given the parties' understanding of the existing relationships between the Bethers and Custom Crushing, as a matter of law, the court could not have concluded that Bethers' had existing rights in the Original

---

. . . .

Q Now, under the terms of that assignment, Custom Crushing had all of the rights that Bethers had, did you understand that?

A Yes.

. . . .

Q Now, did Bethers have a right to remove [gravel] after the he had assigned his rights to Custom Crushing?

A No after he'd assigned his rights to Cursom Crushing, he didn't.

(R. at 630, 633-34.)

[10] Q You just said earlier in your testimony that Ray Bethers had given all his rights to Custom Crushing; isn't that your testimony? That under the assignment of option that was given to Custom Crushing, Bethers had assigned all of his rights?

A He assigned his rights, that's my understanding.

Q And what were the rights that he had? Those were rights in the original lease, right?

A His rights to take gravel out of the pit, yes.

Q So Bethers no longer had any rights. You understood that under the original lease?

A He may still have some right to take gravel out for the royalties that he was entitled to.

Q But that was pursuant to the assignment that Custom Crushing had with Bethers, right?

A Right.

(R. at 764-65.)

Lease. Given that Bethers had no existing rights in the Original Lease, he could not exercise the option to extend the lease. The trial court, therefore, clearly erred in making such a finding.

*C. Conclusion*

The trial court clearly erred when it found that the Custom Crushing Lease did not supersede the Original Lease. Having done so, it incorrectly concluded that the obligation to extend the original lease had not been discharged, and, therefore that Custom Crushing had a duty to pay the heightened royalty beginning February 6, 1997. Custom Crushing respectfully requests that this Court reverse the judgment and remand to the trial court for an entry of judgment in favor of Custom Crushing.

## IV. THE TRIAL COURT INCORRECTLY CONCLUDED THAT THE STATEMENTS OF THE PARTIES REGARDING A JOINT LITIGATION STRATEGY IN AN EFFORT TO COMPROMISE CLAIMS AGAINST EACH OTHER WERE NOT PROHIBITED BY RULE 408 OF THE UTAH RULES OF EVIDENCE

*A. Trial Court's Evidentiary Rulings*

During the course of the trial, the Fitzgeralds offered testimony by Norma Fitzgerald and by Sheldon Smith, former attorney for the Fitzgeralds, regarding discussions that the Fitzgeralds and Custom Crushing had after the Fitzgeralds had indicated their intentions to claim additional royalties from Custom Crushing. (*See* R. at 603-607, 731-739, 741-744, 771-777, 855-859, 868-869, 873-874, 881.)

Norma Fitzgerald testified that on February 7, 1997, she went to the property where the Custom Crushing pit site was and told Steve Zabriskie that the Original Lease

"has not been renewed, now we get our 50 cents." (R. at 599-600.) Steve Zabriskie's response was to decline to pay and say, "I can't pay you both. I can't pay you both. Ray is still claiming rights." (R. at 600.) Counsel then asked Ms. Fitzgerald if she had participated in any meetings "with Custom Crushing regarding Ray Bethers." (R. at 603.) Custom Crushing immediately objected that the discussions were barred under Rule 408 of the Utah Rules of Civil Procedure and asked for voir dire. (R. at 603-04.) In that voir dire, Ms. Fitzgerald was clear that she was making claims against Custom Crushing:

> Q Mrs. Fitzgerald, had you asserted and were you threatening to assert a claim against Custom Crushing at the time you had those meetings?
> A We were all doing it together.
> Q But were you saying to Custom Crushing, you owe us the heightened royalty when you were having those meetings?
> A Yes. I thought we were entitled to them then.
> Q And what was Custom Crushing's response to that?
> A "I can't pay you both."
> Q And were these discussion then about how you could attempt to resolve those problems?
> A Yes.
> Q And that was to avoid litigation?
> A No, it was about litigation at that point.
> Q But it was to avoid litigation between Custom Crushing and you?
> A Yes. We weren't trying to sue Steve.
> Q But it was an attempt to avoid that, is that correct?
> A Right.
> MR. CROOK: Your Honor, I believe that these are settlement negotiations and I believe that any discussion that occurred in those negotiations is outside of Rule 408. 408 says that a party cannot bring in any evidence that is an attempt to establish liability arising out of settlement negotiations and that's exactly what they're trying to do. They're trying to establish [---] to use what was said in those meetings to establish that Custom Crushing had a particular intent in 1995.

(R. at 604-05.) Despite this objection, the trial court allowed the evidence in. (*See* R. at 606-07.) Additionally, the court stated specifically that it would rely on the evidence to establish that Custom Crushing believed that it "did in fact have to get out of [the obligations with Bethers] in some way." (R. at 606.)

Later, when Sheldon Smith, attorney for the Fitzgeralds, testified, the trial court again allowed evidence in of the negotiations. (*See* R. at 731-739, 741-744, 771-777, 855-859, 868-869, 873-874, 881.) Sheldon Smith testified that he received a letter in which Craig Smith, attorney for Custom Crushing, proposed putting money in an escrow account during the time that the matter was being negotiated. (R. at 731; Trial Ex. P-17.) Custom Crushing objected. (*See* R. at 732.) The judge overruled the objection saying there was no dispute. (*See id.*) Sheldon Smith was then asked about a proposed joint litigation strategy to determine the liability of the parties. (*See id.* at 734.) Custom Crushing again objected. (*See id.*) The judge overruled the objection saying "taking legal action is not settlement discussions." (*See id.*) Sheldon Smith was asked about a complaint that was drafted by Custom Crushing and the Fitzgeralds. (*See id.* at 736; Trial Ex. P-18.) Custom Crushing again objected and asked to voir dire. (*See id.*) During voir dire, Custom Crushing asked:

> Q [The Fitzgeralds] had made claim against Custom Crushing, hadn't they, for the heightened royalty?
> A For the 50 cents that was suppose[d] to start February 7, 1997, yes.
> . . . .
> Q But they weren't paying it because they believed that Bethers had the obligation, right?
> A No. In fact they did not believe Bethers had the obligation. They

> just wanted to make sure, they wanted something to solidify that Ray Bethers did not have an obligation.
> Q You were having these discussions to ferret that out; is that right?
> . . . .
> A We actually, the basis of this – and we talked about Ray Bethers a whole lot – and the basis of what we were doing was trying to determine, does Ray Bethers have an interest in the pit or not.
> Q And Custom Crushing wouldn't pay you until that had been determined, is that correct, pay the Fitzgeralds?
> A Yeah. They wanted to make sure they didn't have to pay both the Fitzgeralds and Ray Bethers.

(R. at 737-38.) This time the trial court overruled the objection because the Fitzgeralds were not "suing Custom Crushing to force them to pay." (*Id.* at 738.) The Fitzgerald offered trial exhibits P-16, P-1 & P-18. (*Id.* at 741.) Custom Crushing objected. (*Id.* at 741-42.) The court overruled the objections stating that Custom Crushing had not "identified . . . the controversy." (*Id.* at 743.)

In later testimony, Sheldon Smith admitted further that the Fitzgeralds made demand on Custom Crushing and Custom Crushing refused to pay the heightened royalty. (*See id.* at 771-775.) Craig Smith also testified that the purpose of the meetings was to resolve all of the issues between all of the parties, including the issues between Custom Crushing and the Fitzgeralds. (*Id.* at 855-859, 868-869, 873-874, 881.)

> Q . . . After 1997 when you were meeting with representatives of the Fitzgeralds, was it your understanding that you were only attempting to resolve the claims that Bethers had or were those attempts to resolve the claims that the Fitzgeralds were. . .
> A Both, both claims, both Fitzgeralds' claims for additional royalty and Bethers' claims for continued royalty.
> Q And so when you had any of those proposals, what was the intent? For instan[ce], the draft complaint, what were you intending to do with that?

A We were trying to resolve these issues or these claims.
Q So it was not just Bethers you were trying to deal with?
A No.

(R. at 873-74.)

On October 25, 2002, the Court entered its Findings of Fact and Conclusions of Law. (Findings & Conclusions, Ex. C.) The Findings and Conclusions explicitly relied on the events that occurred in the settlement discussions to establish the intent of the parties.

> 23. During the years of 1997 up to 2001, Custom Crushing and Plaintiffs worked together to determine the rights, if any, of Bethers to compensation under the 1986 Agreement.
>
> 23. In June 1999, Craig Smith, counsel to Custom Crushing, drafted a Complaint naming Custom Crushing and Ray Bethers as defendants seeking quiet title and a declaratory judgment to determine the rights, if any, of Bethers.
>
> 24. In July 1999, Craig Smith, counsel to Custom Crushing, prepared a contingency fee agreement wherein Craig Smith's firm and Sheldon Smith, counsel to Plaintiffs, would share a ten cents per ton royalty from "the date the Court determines the [1986] terminated and Mr. Bethers is not entitled to royalty, and run through February 6, 2002, the last date the [Original Lease] and all options would expire if all required notices had been given.

*B. The Trial Court's Rulings Were Incorrect*

Utah Rule of Evidence 408 provides in full:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely

> because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

"This rule follows verbatim Federal Rule of Evidence 408 which was used as a model in drafting the Utah Rules. Accordingly, this court looks to federal law interpreting Federal Rule of Evidence 408 to define the contours of Utah Rule of Evidence 408." *Davidson v. Prince*, 813 P.2d 1225, 1232 (Utah Ct. App. 1991); *accord State v. Mead*, 2001 UT 58, ¶ 44, 27 P.3d 1115.

One of the underlying or threshold requirements of the exclusionary rule is that the "'discussions in question [be] made in "compromise negotiations."'" *Davidson,* 918 P.2d at 1232 (quoting 10 J. Moore & H. Bendix, *Moore's Federal Practice* § 408.04 (1988 & Supp. 1990)). Whether "compromise negotiations" are occurring depends on whether a party has a dispute with the other party with whom he is negotiating. "Rule 408 exclusion applies where an actual dispute or a difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation." *Affiliated Manufacturers, Inc. v. Aluminum Company*, 56 F.3d 521, 527 (3rd Cir. 1995); *accord Dallis v. Aetna Life Ins. Co.*, 768 F.2d 1303, 1307 (11th Cir. 1985); *cf. C.J. Duffey Paper Co v. Reger*, 588 N.W.2d 519, 524 (Minn. Ct. App. 1999) ("an 'actual controversy' must exist at the time of the alleged offer"). Additionally, "when the issue is doubtful, the better practice is to exclude evidence of compromise or compromise offers." *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1364 (10th Cir. 1987).

A trial court's determinations arising under Rule 408 are reviewed for correctness. "[W]hen [an] evidentiary ruling at issue is an independent legal issue and does not involve the balancing of factors, [the Courts] review the determination for correctness." *State v. Whittle*, 1999 UT 96, ¶21, 989 P.2d 52 (citing *State v. Dunn*, 850 P.2d 1201, 1222 n.22 (Utah 1993)); *cf. Davidson*, 813 P.2d at 1233 (stating that "the trial judge was *correct* in admitting the statement from the letter sent by appellant to appellee because the letter was not an offer to compromise appellant's claim" (emphasis added)).

In this case the trial court incorrectly ruled that the Fitzgeralds could present evidence of the parties discussions in their meetings after 1997 and the proposals that arose during those discussions. In the first instance, it is clear that the parties did have a dispute and that these negotiations were compromise negotiations. As discussed above, Norma Fitzgerald testified that she made claim on Custom Crushing for the heightened royalty the day after she claimed the written notice of extension was due. She also testified that immediately upon making that demand, Custom Crushing refused to pay the heightened royalty because Bethers was still making claim on the royalties and Custom Crushing refused to pay both Bethers and the Fitzgeralds. Sheldon Smith also testified that Custom Crushing refused to pay if both parties were making claims and would not do so until the matter had been completely resolved. Craig Smith's testimony is consistent as well.

This clearly meets the definition of a dispute. In *Affiliated Manufacturers*, two parties disagreed about the amount of compensation that was owed. *See* 56 F.3d at 523.

The two parties began negotiations about those disagreements well before bringing a law suit. *See id.* The court ruled that "the scope of the term 'dispute' . . . include[s] a clear difference of opinion between the parties . . . concerning payment of two invoices" prior to litigation and excluded discussions and documents derived during that period. *Id.* at 528. This case is analogous. Just as in *Affiliated,* the Fitzgeralds made a claim against Custom Crushing, as did Bethers. Custom Crushing refused to pay the Fitzgeralds because Bethers was continuing to make claim for his royalties. Custom Crushing did not believe that both parties were correct and refused to pay the Fitzgeralds what they claimed. The parties admittedly entered into negotiations in an attempt to avoid litigation and to settle the controversy.

*C. The Error Was Harmful*

In this case, it is clear that absent the trial court's error in allowing the evidence in, there is a reasonable likelihood that a different result would have been reached. *See Stevenett v. Wal-Mart Stores, Inc.*, 1999 UT 80, ¶8, 977 P.2d 508. In overruling its objections, the trial court was very clear to point out that it was relying on the evidence deriving from the settlement negotiations in determining Custom Crushing's intent. The trial court specifically stated that it would rely on the evidence to establish that Custom Crushing believed that it "did in fact have to get out of [the obligations with Bethers] in some way." (R. at 606.) Additionally, the trial court specifically made findings with regard to the settlement negotiations, relying on the evidence of the discussions and documents produced in those discussions to establish what it believed Custom Crushing

intent in 1995.

Further, without this evidence there would be no significant evidence of the intention of the parties with respect to their understanding of the agreements. For instance, more than half of the questions to Sheldon Smith on direct examination (all but 11 page of the twenty-eight pages of the transcript) were about these post-1997 settlement negotiations (*See* R. at 731-748.) Additionally, the trial court chastised Custom Crushing when it objected to documents and evidence relative to the joint litigation strategy, suggesting that this evidence clearly affected the findings and conclusions. (*See* R. at 741-42.) Moreover, the findings themselves include three paragraphs dedicated to the settlement negotiations and only one paragraph mentioning pre-Custom Crushing Lease negotiations.

*D. Conclusion*

Given the trial court's harmful error in allowing evidence of settlement negotiations at the time of the trial, Custom Crushing requests that the trial court's judgment be reversed and the case remanded for a new trial to excluding any evidence of the discussions or documents deriving from the settlement negotiations

## CONCLUSION

Custom Crushing respectfully submits that the trial court incorrectly denied its motion for summary judgment when it determined that there was an issue of fact precluding summary judgment. Accordingly, Custom Crushing respectfully requests that this Court reverse the trial court order and remand for the entry of summary judgment in

favor of Custom Crushing.

In the alternative, Custom Crushing submits that the trial court incorrectly concluded that Bethers had continuing rights in the Original Lease. Given that Bethers had assigned his rights in the Original Lease to Custom Crushing, Bethers had no right to extend the option. Therefore, the trial court incorrectly concluded that the Original Lease could only be extended by written notice from Bethers. Accordingly, Custom Crushing respectfully requests that the Court reverse the judgment and remand for entry of judgment against the Defendants.

Additionally, Custom Crushing submits that the trial court clearly erred in finding that the Custom Crushing Lease did not supersede the Original Lease. Having done so, it incorrectly concluded that the obligation to extend the original lease had not been discharged, and, therefore, that Custom Crushing had a duty to pay the heightened royalty to the Fitzgeralds beginning February 6, 1997. Custom Crushing respectfully requests that this Court reverse the judgment and remand to the trial court for an entry of judgment in favor of Custom Crushing.

Finally, the trial court incorrectly permitted clearly harmful evidence of discussions and documents deriving from settlement negotiations. Accordingly, Custom Crushing respectfully requests that this Court remand the case to the trial court for a new trial.

DATED this 25th day of August, 2003.

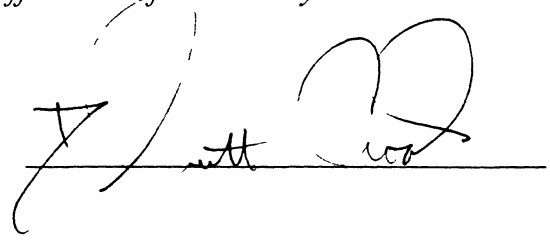
SMITH HARTVIGSEN PLLC

D. Scott Crook
*Attorney for Appellant Custom Crushing, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **APPELLANT'S BRIEF** were served via first-class mail, postage pre-paid, U.S. Mail, this 25th day of August, 2003 to the following:

Brian J. Babcock
BABCOCK, SCOTT, BABCOCK
57 West South Temple, 8th Fl.
Salt Lake City, UT 84101
*Attorney for Plaintiffs and Defendant Ray Bethers*



# Appendices

# APPENDIX

**A. Order Denying Cross Motions For Summary Judgment**

**B. Judgment and Order**

**C. Findings of Fact and Conclusions of Law**

**D. Notice of Appeal**

**E. Option for Purchase of Sand and Gravel**

**F. Purchase and Broker Agreement**

**G. Assignment of Option**

**H. Lease Agreement**

# Appendix A

Sheldon A. Smith, A4914
SHELDON A. SMITH & ASSOCIATES,
a Professional Corporation
P.O. Box 972
149 South Main Street
Coalville, Utah 84017
Telephone: (435) 336-1200
Fax: (435) 336-0195

No. _____



**IN THE THIRD DISTRICT COURT IN AND FOR**

**SUMMIT COUNTY, STATE OF UTAH**

| | |
|---|---|
| DON FITZGERALD, NORMA FITZGERALD, STEVEN FITZGERALD and CLOVERLEAF RANCH, LC,<br><br>Plaintiffs,<br><br>vs.<br><br>RAY BETHERS and CUSTOM CRUSHING, INC.,<br>a Utah Corporation,<br><br>Defendants. | ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT<br><br>Case No. 00060063 CN<br><br>Judge Robert Hilder |

On Wednesday, August 1, 2001, Plaintiffs' Motion For Summary Judgment and Defendant Custom Crushing, Inc.'s Motion For Summary Judgment was heard by the Honorable Judge Hilder, District Court Judge. Plaintiffs' were represented by Sheldon A. Smith and Defendant Custom Crushing was represented by D.Scott Crook. Based upon the arguments of counsel and other good cause,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment and Defendant Custom Crushing's Motion for Summary Judgment are denied based upon the Courts finding that there are material issues of fact and that

their are ambiguities in how the Contracts are construed together.

DATED this 5th day of September 2001.

Judge Robert Hilder
District Court Judge

APPROVED AS TO FORM:

D. Scott Crook
Attorney for Custom Crushing

Sheldon A. Smith
Attorney for Plaintiffs

I hereby certify that a true and correct copy of the foregoing was mailed first class, postage prepaid, this 10th day of August 2001.

J. Craig Smith
D. Scott Crook
NIELSEN & SENIOR
Suite 1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Brian J. Babcock
BABCOCK, BOSTWICK, et al.
57 West South Temple
8th Floor
Salt Lake City, Utah 84101

By Sheldon A Smith
Sheldon A Smith

# Appendix B

ORIGINAL

No.

FILED
JAN - 6 2003 12:10
By Deputy Clerk, Summit County

Brian J. Babcock (6172)
BABCOCK SCOTT & BABCOCK
Attorneys for Plaintiff
57 W. South Temple, 8th Floor
Salt Lake City, Utah 84101
Telephone: (801) 531-7000
Facsimile: (801) 531-7060

**IN THE THIRD JUDICIAL DISTRICT COURT**
**IN AND FOR SUMMIT COUNTY, STATE OF UTAH**

| | |
|---|---|
| DON FITZGERALD, NORMA FITZGERALD, STEVEN FITZGERALD, and CLOVERLEAF RANCH, L.C., | **JUDGMENT AND ORDER** |
| Plaintiff, | |
| vs. | Civil No. 000600063 |
| RAY BETHERS and CUSTOM CRUSHING, INC., a Utah corporation, | Judge Robert K. Hilder |
| Defendants. | |

The Court having previously signed and entered the Findings of Fact and Conclusions of on October 25, 2002,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, Plaintiffs are awarded judgment against Defendant Custom Crushing as follows:

| | |
|---|---|
| Principal ($.24 x 1,548,565.4 tons of material up through May 31, 2002) | $371,655.70 |
| Prejudgment interest (10 % per year to December, 2002) | $93,785.73 |
| Accrued costs to date of judgment | $717.92 |

| | |
|---|---|
| Attorneys fees per affidavits | $42,671.42 |
| Less credit for payments to MCM on behalf of Ray Bethers | <$1,600.00> |
| Credit for material used by Plaintiffs | <$4,991.72> |
| **TOTAL JUDGMENT** | $502,239.05 |

Post-judgment rate

with interest accruing hereafter at the ~~legal~~ rate until paid in full.

IT IS FURTHER ORDERED that the money deposited with the Court by Custom Crushing is to be released to Plaintiffs immediately after the time for Custom Crushing to appeal this Judgment, unless Custom Crushing posts a supercedious bond with its appeal. Upon receipt of said payment, Plaintiffs are ordered to credit the amount received from the Court towards this Judgment against Custom Crushing.

IT IS FURTHER ORDERED that Custom Crushing is obligated to pay to Plaintiffs the fifty cent ($0.50) royalty for all materials removed from the Property regardless whether or not Custom Crushing received payment for the materials removed. This applies to all material except that material listed on Plaintiffs' Exhibit 13.

IT IS FURTHER ORDERED that this Judgment shall be augmented in the amount of fifty cents ($.50) per ton for all materials removed after May 31, 2002, less any payments made by Custom Crushing to Plaintiffs. Said amounts to be augmented shall be established by affidavit.

IT IS FURTHER ORDERED that Custom Crushing is to pay Plaintiffs fifty cents ($0.50) per ton royalty for all payments received for materials listed on Plaintiffs' Exhibit 13.

IT IS FURTHER ORDERED that all claims of Custom Crushing regarding storage or removal of the scales from the Property are dismissed with prejudice.

AND IT IS FURTHER ORDERED that this Judgment shall be augmented in the amount of reasonable costs and attorneys' fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

DATED this 6th day of January, 2003.

BY THE COURT:

Judge Robert K. Hilder

00530

**CERTIFICATE OF SERVICE**

I certify that on the 10th day of December, 2002, I mailed by U.S. mail, first-class, postage prepaid, a true and correct copy of the foregoing JUDGMENT AND ORDER to the following:

D. Scott Crook
SMITH HARTVIGSEN, PLLC
Suite 1150, Eagle Gate Plaza and Officer Tower
60 East South Temple
Salt Lake City, Utah 84111

Reggie Ainsworth

00531

# Appendix C

ORIGINAL



Brian J. Babcock (6172)
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**IN THE THIRD JUDICIAL DISTRICT COURT**
**IN AND FOR SUMMIT COUNTY - STATE OF UTAH**

| | |
|---|---|
| DON FITZGERALD, NORMA FITZGERALD, STEVEN FITZGERALD, and CLOVERLEAF RANCH, L.C.,<br><br>Plaintiffs,<br><br>vs.<br><br>RAY BETHERS and CUSTOM CRUSHING, INC., a Utah corporation,<br><br>Defendants. | **FINDINGS OF FACT and CONCLUSIONS OF LAW**<br><br>Civil No. 000600063<br><br>Judge Robert K. Hilder |

The above entitled matter came before Judge Robert K. Hilder on a bench trial on July 9, 10, and 11, 2002. Plaintiffs were represented by Brian J. Babcock of BABCOCK, BOSTWICK, SCOTT, CRAWLEY & PRICE and Defendant Custom Crushing was represented by D. Scott Crook of NIELSEN & SENIOR. Based up the testimony and evidence presented at trial, the Court makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. The Fitzgeralds and Cloverleaf ("Plaintiffs") are the owners of a gravel pit located

in Francis, Summit County, Utah (the "Property").

2. In 1986, the Plaintiffs entered into an agreement with L. Clifton Read, Jr. ("Read") entitled "Option for Purchase of Sand and Gravel" ("1986 Agreement"), which gave Read the right to remove sand and gravel from the Property. (Plaintiffs' Ex. #1)

3. The 1986 Agreement had an initial option period of six (6) years.

4. The 1986 Agreement had two (2) additional five (5) year option periods.

5. The 1986 Agreement required that written notice be provided to the Plaintiffs of any election to extend any of the two subsequent option periods prior to the expiration of the previous option period.

6. On or about June 26, 1991, Read entered into a "Purchase and Broker Agreement" with Bethers, which sold and assigned to Bethers the rights and interests Read had obtained in the 1986 Agreement to remove sand and gravel from the Property. (Plaintiffs' Ex. #2)

7. On or about January 22, 1992, Bethers sent a "Notice of Extension" to the Plaintiffs which exercised the second option period and extended the 1986 Agreement to February 6, 1997. (Plaintiffs' Ex. #3)

8. On or about May 5, 1995, Bethers entered into an "Assignment of Option" with Custom Crushing, which assigned to Custom Crushing the rights Bethers had obtained from Read to remove sand and gravel from the Property. (Plaintiffs' Ex. #4)

9. ~~The Assignment of Option was drafted by Custom Crushing.~~ Custom Crushing's counsel participated in the drafting of the Assignment of Option. RLB. (Plaintiffs' Ex. #5)

10. The Assignment of Option required Custom Crushing to pay Bethers "twenty cents ($0.20) per ton royalty for all sand, gravel, aggregate or other rock product sold which is



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produced and sold on or from the Property during the term of 'The Option for Purchase of Sand and Gravel'" (which is the 1986 Agreement reference herein).

11. The Assignment of Option required Custom Crushing to provide Bethers with monthly notice of the amount of royalty to which Bethers was entitled. Bethers was to take his material royalty within one year of such notice.

12. Custom Crushing provided two (2) notices to Bethers of royalty. One dated July 10, 1996 (Plaintiffs Ex. #11) and one dated August 1. 1996 (Plaintiffs' Ex. #12).

13. Custom Crushing did not provide any further notices.

14. On or about June 6, 1995, the Plaintiffs entered into a "Lease Agreement" with Custom Crushing, which allowed Custom Crushing to remove sand and gravel from the Property. (Plaintiffs' Ex. #5)

15. The Lease Agreement was drafted by Custom Crushing. (Plaintiffs' Ex. #5)

16. The Lease Agreement provided that Custom Crushing was to pay the Plaintiffs a royalty of ($0.26) per ton of material sold "until such time as Custom Crushing was no longer obligated to provide compensation to Ray Bethers." The Lease Agreement further stated that "at the time Custom Crushing is no longer obligated to provide compensation to Ray Bethers, the royalty to the [Plaintiffs] shall be increased to ($0.50) per ton."

17. During the negotiation of the Lease Agreement, Custom Crushing stated that it would rather pay Plaintiffs than Bethers.

~~18. During the negotiation of the Lease Agreement, Custom Crushing stated that it would not exercise the last option period in the 1986 Agreement.~~

19. During the negotiation of the Lease Agreement, Plaintiffs and Custom Crushing agreed that if Bethers provided written notice to the Plaintiffs prior to February 6, 1997 to exercise the last option period, the 1986 Agreement and compensation to Bethers would be extended to February 6, 2002.

20. No written notice was delivered to the Plaintiffs prior to February 6, 1997 to exercise the last five-year option period under the 1986 Agreement.

21. On or about May 24, 1997, the Plaintiffs had delivered to Bethers written notice informing him of the expiration of the 1986 Agreement. (Plaintiffs' Ex. #6)

22. During the years of 1997 up to 2001, Custom Crushing and Plaintiffs worked together to determine the rights, if any, of Bethers to compensation under the 1986 Agreement.

23. In June 1999, Craig Smith, counsel to Custom Crushing, drafted a Complaint naming Custom Crushing and Ray Bethers as defendants seeking quite title and a declaratory judgment to determine the rights, if any, of Bethers. (Plaintiffs Ex. #18)

24. In July 1999, Craig Smith, counsel to Custom Crushing, prepared a contingency fee agreement wherein Craig Smith's firm and Sheldon Smith, counsel to Plaintiffs, would share a ten cents per ton royalty from "the date the Court determines the [1986 Agreement] terminated and Mr. Bethers is not entitled to royalty, and run through February 6, 2002, the last date the [1986 Agreement] and all options would expire if all required notices had been given." (Plaintiffs' Ex. #19)

25. From 1996 through May 31, 2002, Custom Crushing has paid to Plaintiffs a royalty of twenty-six cents ($0.26) per ton. (Plaintiffs' Ex. #7)

26. From February 7, 1997 through May 31, 2002, Custom Crushing has removed and been paid for 1,548,565.4 tons of material from the Property. (Plaintiffs' Ex. #7 and Ex. #8)

27. From February 7, 1997, Custom Crushing has not paid Plaintiffs for any material that was removed from the Property for which Custom Crushing has not been paid by its customer.

28. Plaintiffs have received material and credited to Custom Crushing a total of $4,991.72 for said material. (Plaintiffs' Ex. #8 and #9)

29. Custom Crushing paid on Bethers behalf $1,600 to MCM for engineering services performed at the Property.

30. Bethers provided scales to the Property for Custom Crushing's use pursuant to the Assignment of Option. The Assignment of Option states that "at the end of the term of the '[1986 Agreement]', Bethers may take possession of the scales." (Plaintiffs' Ex. #4)

31. On or about June 15, 1998, Custom Crushing requested that Bethers remove the scales from the Property. (Defendant's Ex. #9)

32. On or about May 1, 2001, Bethers assigned to Plaintiffs all of his rights, interest and claims, if any, against Custom Crushing. (Plaintiffs' Ex. #10)

33. Custom Crushing has deposited funds with the Court pursuant to a previous stipulation between the parties.

## CONCLUSIONS OF LAW

1. Under the express terms of the 1986 Agreement, the agreement would terminate on February 6, 1997 if the last option was not exercised by Bethers.

2. The last option contained in the 1986 Agreement which would have extended the term to February 6, 2002 was not exercised.

3. Without the required notice to exercise, the 1986 Agreement expired under its own terms on February 6, 1997, and thereafter had no legal force or effect.

4. After February 6, 1997, Custom Crushing was no longer obligated to provide compensation to Bethers.

5. After February 6, 1997, Custom Crushing was obligated to pay to Plaintiffs a royalty of fifty cents ($0.50) per ton for all material removed from the Property.

6. Plaintiffs' Exhibit #8 accurately sets for the yearly amounts of material which Custom Crushing has removed from the Property and for which it has been paid after February 7, 1997 up through May 31, 2002, that being 1,548,565.4 tons of material.

7. Plaintiffs are entitled to judgment against Custom Crushing for the amount of twenty-four cents ($0.24) per ton for each of the 1,548.565.4 set forth in Plaintiffs' Exhibit #8.

8. Plaintiffs are entitled to interest at the rate of ten percent (10%) per annum on each unpaid monthly royalty payment subsequent to February 7, 1997 when it was due and payable to Plaintiffs.

9. Custom Crushing is obligated to pay to Plaintiffs the fifty cent ($0.50) royalty for all materials removed from the Property after February 7, 1997 regardless whether or not Custom Crushing receives payment for the materials removed.

10. Plaintiffs have not provided sufficient evidence to support its claims for materials removed from the Property by Custom Crushing to which Custom Crushing has not been paid.

(Plaintiffs Ex. #13). Nevertheless, when Custom Crushing is paid for the materials listed on Plaintiffs Ex. #13, Custom Crushing is to pay to Plaintiffs fifty cents ($0.50) per ton royalty for all payments received.

11. The Assignment of Option language regarding the removal of scales is ambiguous.

12. After the expiration of the 1986 Agreement on February 6, 1996, Bethers was not obligated to remove the scales from the Property.

13. Even if Bethers was obligated to remove the scales from the Property, Custom Crushing did not provide any credible evidence to support its claims for storage or removal of the scales from the Property. All such claims are to be dismissed with prejudice.

14. Custom Crushing did not provide Bethers with a proper accounting of the materials produced during the period of time in which Bethers was entitled to compensation.

15. The material or payments which Custom Crushing provided to Bethers or its assign MCM was for royalty compensation to which Bethers was entitled and is not to be credited against royalties owed to Plaintiffs.

16. Bethers has waived any further rights or claims to related to the Property for lack of notice provided by Custom Crushing and is not entitled to any additional material royalties from Custom Crushing or the Property.

17. Custom Crushing is entitled to a credit of $1,600 against Plaintiffs as assignee of Bethers' claims for payment made to MCM.

18. Custom Crushing is entitled to a credit of $4,991.72 for materials provided to

Plaintiffs as provided on Plaintiffs' Exhibit #8 and Exhibit #9.

19. Plaintiffs are the prevailing party to this action and are entitled to an award of their court costs and attorneys fees incurred in this action.

20. The money which has been deposited with the Court by Custom Crushing in accordance with a previously filed stipulation between the parties is to be released to Plaintiffs immediately after the time to for Custom Crushing to appeal the judgment in this matter. unless Custom Crushing posts a supercedious bond with its appeal. Plaintiffs shall credit towards the judgment against Custom Crushing any funds received from the Court.

DATED this 25th day of ~~August~~ October, 2002.

BY THE COURT

By: _____
Robert K. Hilder

Approved as to Form:

DATED this _____ day of August, 2002.

NIELSEN & SENIOR

By: _____
D. Scott Crook, Esq.
Attorney for Custom Crushing

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000600063 by the method and on the date specified.

| METHOD | NAME |
|---|---|
| Mail | BRIAN J BABCOCK<br>ATTORNEY PLA<br>57 WEST SOUTH TEMPLE<br>8TH FLOOR<br>SALT LAKE CITY, UT<br>84101-0000 |
| Mail | D. SCOTT CROOK<br>ATTORNEY DEF<br>1100 EAGLE GATE TOWER<br>60 EA SO TEMPLE<br>SALT LAKE CITY UT 84111 |

Dated this 28th day of Oct., 2002

Debbie K. Foust
Deputy Court Clerk



00447

# Appendix D

D. Scott Crook (7495)
**SMITH HARTVIGSEN, PLLC**
Suite 1150 Eagle Gate Tower
60 East South Temple
Salt lake City, Utah 84111
Telephone: (801) 413-1600
Fax: (801) 413-1620

*Attorneys for Defendant Custom Crushing*



**IN THE THIRD DISTRICT COURT**
**SUMMIT COUNTY, STATE OF UTAH**

| | |
|---|---|
| DON FITZGERALD, NORMA FITZGERALD, STEVEN FITZGERALD, and CLOVERLEAF RANCH, LC,<br><br>Plaintiffs,<br><br>vs.<br><br>RAY BETHERS and CUSTOM CRUSHING, INC., a Utah corporation,<br><br>Defendants. | **NOTICE OF APPEAL**<br><br>Case No.000600063<br><br>Judge Robert Hilder |

Notice is hereby given that the Defendant Custom Crushing, Inc., by and through its attorneys of record, appeals to the Utah Supreme Court from the Order Denying Cross Motions for Summary Judgment entered by the Honorable Robert Hilder on September 5, 2001, and the Judgment entered by the Honorable Robert Hilder in this matter on January 7, 2003. Appeal is taken from the entire order and the entire judgment.

DATED this 5th day of February, 2003.

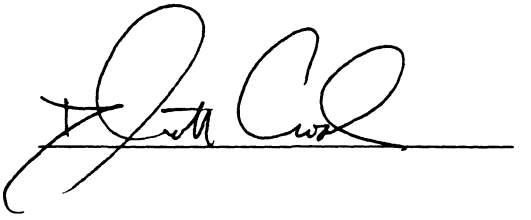
SMITH HARTVIGSEN PLLC

D. Scott Crook

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF APPEAL** was served via first-class mail, postage pre-paid, U.S. Mail, , this 5th day of February, 2003 to the following:

Brian J. Babcock
BABCOCK, SCOTT, BABCOCK
57 West South Temple, 8th Fl.
Salt Lake City, UT 84101
*Attorney for Plaintiffs and Defendant Ray Bethers*



# Appendix E

P.O. Box 1985
Park City, Ut. 84

283655
88 FEB 10 PM 2:17
ALAN SPRIGGS
SUMMIT COUNTY RECORDER
REC'D BY

# OPTION FOR PURCHASE OF SAND AND GRAVEL

This Agreement entered into this 6TH day of February, 1986, by and between L. Clifton Read, Jr., (herein "Read") and Don M. Fitzgerald and Norma Fitzgerald, his wife, of RFD, Kamas (Francis) Utah (herein "Owners"). Steven Don Fitzgerald (their son) an interest owner of RFD, Kamas (Francis) Utah (herein "Owners").

## WITNESSETH

For and in consideration of the sum of Five Hundred Dollars, receipt whereof is hereby acknowledged, the Owners hereby grant to Read the exclusive right and option to purchase sand, gravel and road and dam building materials (herein collectively referred to as "materials") from the property of the Owners located in Summit County, Utah and more particularly described as follows:

The SW¼ of the NE¼ of
Section 32, T2S, R 6 E,
SLB & M.

The option may be exercised by Reads removal of materials from time to time as he shall determine.

## OPTION PERIOD-EXTENSIONS

This option shall remain in full force and effect for a period of six (6) years from date hereof unless renewed as provided for herein. If Read shall purchase materials during the initial six year option period, (the "initial option" period), he shall have the right to extend the option for an additional five years (the "second option" period). If Read shall purchase materials during the second option period he shall have the right to extend the option for an additional five years following expiration of the second option period. Notice of exercise of Reads election to extend the option with respect to the first five year extension shall be given prior to expiration of the initial option period and notice with respect to the second five year extension shall be given prior to expiration of the second option period. Any such notices given by Read shall be in writing and shall be deemed delivered upon personal delivery to owners or either of them or posting in the United States mail postage prepaid in an envelope addressed to owners at RFD Kamas (Francis), Utah.

PURCHASE PRICE OF MATERIALS

As and when the option is exercised by Read's removal of materials from the property Read agrees to pay or cause to be paid to owners as the purchase price for said materials the sum of twenty five cents ($0.25) per ton or in the case of washed materials then thirty cents ($0.30) per ton for all materials removed from the property. Read shall provide a scale and operator to weigh all materials removed from the property. If materials are removed during any calendar month an accurate record of the same shall be provided to the owners within 15 days after the close of said calendar month. The purchase price of materials removed by Read shall be paid as and when such records of removal are provided to the owners.

ASSIGNMENT

This option shall be binding on the parties hereto, and their successors, heirs and assignees. The rights and privileges hereby granted to Read may at Reads option be exercised by any agent or contractor of Read or by his successors and assigns.

SPECIAL STIPULATIONS

1. Read has entered into this Agreement and has paid the $500.00 option money in reliance upon:

(a) Owners ownership of fee simple title to the property and the materials.

(b) Owners providing suitable access from the property to the public highway.

(c) Reads ability to obtain all necessary governmental approvals for use and operation of the property as a sand and gravel pit including zoning approvals if required.

Owner agrees to fully cooperate with Read to secure fulfillment of the foregoing conditions and Read at his expense shall conduct such investigation with respect to title and access and shall initiate and prosecute such applications for governmental approvals as he shall determine to be necessary or useful to determine satisfaction of each of the conditions set forth in subparagraphs (a), (b) and (c) above. If in Reads sole discretion it is determined that any one or more of such conditions has not been fulfilled then this option may be terminated upon written notice from Read to the Owners and if so terminated within one year from date of this Agreement then the Owners shall return to Read the $500.00 option money paid by Read.

[illegible] has been removed by Read from the property during the first year, subject to the foregoing, the owners upon written notice to Read may terminate this option.

2. If this option is exercised by the removal of materials by Read then $400.00 of the $500.00 option money shall be credited against the purchase price of the first materials removed by Read.

3. The Owners shall provide water to Read without expense to him as shall be required to wash materials removed from the property.

4. All livestock and other property of Owners shall be protected during materials removal operations. Any fences removed or damaged during the course of removal operations shall be repaired or replaced to their condition as of the date of this Agreement.

5. Materials removed shall commence along the northwesterly margin of the existing gravel terrace and proceed therefrom southeasterly. The floor of the excavation shall be left reasonably smooth and as near as reasonably possible shall be sloped uniformly from east to west at a uniform 1% grade. The terminal ends of the excavated area shall effect a squared off east-west north south alignment and the cut banks shall be sloped at 2:1 or less.

6. All topsoil on the excavated area shall be stockpiled and spread over the excavation at the conclusion of material operations.

7. A road from the excavated area to the right of way road shall be established by Read.

8. At the termination of materials removal operations the excavation shall consist of one continuous excavated area squared offf with north-south east west terminal cut banks and the same shall be cyclone seeded to the Owners reasonable satisfaction and all fences damaged or removed by Read shall be re-established as provided for herein.

IN WITHNESS WHEREOF the parties have executed this agreement the day and year above set forth.

BOOK 462 PAGE 716

OWNERS:

Don M. Fitzgerald

Norma Fitzgerald

Steven Don Fitzgerald

READ:

State of Utah )
)ss
County of Summit)

On the 7th day of February, 1986, personally appeared before me Don M. Fitzgerald, Norma Fitzgerald and L. Clifton Read, Jr., the signers of the foregoing instrument who each duly acknowledged to me that he (she) signed the same. Also personally appeared before me Steven Don Fitzgerald who acknowledged to me that he signed the foregoing instrument.

Notary Public Residing
at Kamas Utah

My Commission Expires:
Aug 3, 1988

BOOK 462 PAGE 717

# Appendix F

# PURCHASE AND BROKER AGREEMENT

THIS AGREEMENT made this 26th day of June, 1991 between L. CLIFTON READ, JR. (herein "Read") and RAY BETHERS (herein "Bethers")

W I T N E S S E T H :

Recitals. Read is Optionee under a certain Option Agreement hereinafter more particularly described together with rights-of-way, permits and other governmental approvals related thereto relating to a gravel pit operation located on property hereinafter described, together with weigh scales located in the gravel pit and a stock pile of materials also located in the gravel pit. Bethers have agreed to purchase Read's interest in the Option Agreement and in the scales and to sell the stock pile of materials on Read's behalf. This Agreement sets forth the terms and provisions agreed to by the parties with respect to the subject matter.

NOW THEREFORE, in consideration of the mutual covenants of the parties hereto, it is agreed as follows:

1. Description of Property to be Sold. Read hereby sells and assigns to Bethers all of his right, title and interest in and to the following described property:

All the right, title and interest of Read under and pursuant to that certain "Option for Purchase of Sand and Gravel" dated February 6, 1986, executed by Don M. and Norma Fitzgerald and Steven Don Fitzgerald as "Owners" and L. Clifton Read, Jr., as "Read", which Option was recorded February 10, 1988 in Book 462 at Pages 714-717 of the official records of the Summit County Recorder covering property described as the Southwest quarter of the Northeast quarter of Section 32, Township 2 South, Range 6 East, Salt Lake Base & Meridian.

All right, title and interest of Read in and to the weigh scales now located on the property described in the Option Agreement above referred to.

All right, title and interest of Read in and to the Conditional Use Permit issued by the Summit County Planning Commission with respect to the gravel pit and crushing operation conducted on the property described in the Option, together with all road encroachment permits, right-of-way agreements and subject to the Road Maintenance Agreement with Summit County, each pertaining to the said gravel pit operation.

Bethers acknowledge that they are experienced in the crushing and gravel pit operations; that they are familiar with the property which is the subject of the Option, and that they are familiar with the Option, the operating permits and the Road Maintenance Agreement and that they have agreed to accept transfer of Read's interest in said agreements and rights, subject to all existing claims and defenses relating thereto and without warranty by Read. Read makes no representation or warranty with respect to the validity or enforceability of the Option and permits and rights-of-way relating thereto, but has agreed, in effect, to Quit Claim whatever interest he may have in the same to Bethers. Should Bethers desire, Read agrees to execute a separate short form assignment relating to the Option Agreement and related permits and rights.

2. Purchase Price of Properties Described in Paragraph 1. In consideration of the transfer and assignment to Bethers of Read's rights in and to the property described in Paragraph 1, Bethers agrees to pay Read the sum of $20,000 payable as follows:

$5,000 on demand by Read. Read acknowledges that Bethers is entitled to a credit against said sum of $5,000 for transportation of equipment in the amount of approximately $2,200, the exact amount of which is to be determined between Read and Bethers upon the furnishing of an accounting by Bethers and concurrence by Read. Read may require additional services from Bethers, in which event Read shall defer demand for the payment of the remaining balance of said $5,000, pending the performance of such additional services.

The balance of $15,000 shall be paid on a monthly basis on or before the 10th day of each month hereafter, based upon 10¢ per ton for all materials in the gravel pit excavated, crushed and shipped by Bethers during the preceding month. All such materials shall be weighed at the pit when shipped and Bethers shall provide an accounting to Read on or before the 10th day of each month following shipment of such materials and concurrent with the furnishing of such accounting shall pay to Read the amount due Read based upon 10¢ per ton. The $15,000 balance due Read shall not bear interest, providing the entire amount thereof is paid on or before January 1, 1992. Any remaining unpaid balance due as of January 2, 1992, shall bear interest at the rate of 12% per annum.

3. Stock Pile of Materials to be Sold by Bethers for Read's Account. The parties acknowledge as of the date of this Agreement that there is a stock pile of materials produced and owned by Read consisting of approximately 30,000 tons of commercial road base; 2,000 tons of cobble rock; 1,000 tons of state spec road base, and 500 tons of drain rock. The parties acknowledge that the quantities shown herein are simply rough estimates of

the amounts held in the stock pile. Upon execution and delivery of this Agreement, Bethers agrees to promptly and diligently undertake to sell the stock pile of materials at reasonable prices to be determined by Bethers and to pay Read the sum of $2.00 per ton (unless otherwise agreed in writing by Read) for each ton sold and delivered by Bethers. All such materials shall be weighed at the pit and Bethers shall account to Read for the sale of the same on or before the 10th day of each month following. Concurrently with the furnishing of such accounting, Bethers shall pay to Read the sum of $2.00 per ton (or such other sum as Read shall agree in writing to accept) for each ton sold and delivered during the preceding month.

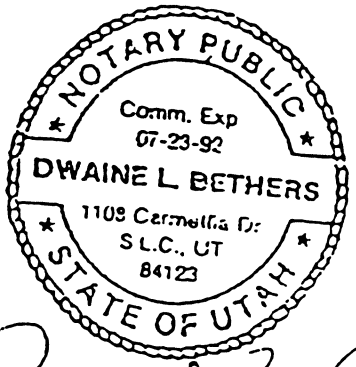
4. Assumption of Liabilities. In consideration of the terms and provisions of this Agreement, Bethers has and does hereby covenant and agree to assume and perform each and all of the obligations of Read under the provisions of the Option, the Conditional Use Permit, the Right-of-Way Agreement, the Road Maintenance Agreement and any other permits and agreements relating to the gravel pit operation on the premises described in the Option. Bethers acknowledges that they shall be required to fully comply with any valid federal, state and local regulations relating to the operation of the gravel pit, including without limitation, air quality regulations of the Utah Bureau of Air Quality. Bethers acknowledges that he may be required to remedy defaults or breaches claimed to have occurred prior to the date of this Agreement. Bethers further agrees to indemnify and hold Read harmless from any loss, claims or damages including attorneys fees arising out of the Option Agreement and the operations hereafter conducted on the premises described in the Option Agreement.

5. Indemnity. Each party acknowledges that he is familiar with certain litigation now pending with respect to the operations conducted on the premises described in the Option and particularly that certain lawsuit pending in the District Court of Summit County, State of Utah, Civil No. CV-10051 entitled Carmen Atkinson et al vs. C. R. Sales & Construction, Inc. et al. Bethers is familiar with the said litigation and takes the properties assigned and transferred herein subject to the same. Bethers shall have the right in their sole discretion to enter an appearance in said litigation should they choose to do so. Bethers shall have no obligation to indemnify or hold harmless C. R. Sales and Construction, Inc. and/or Park City Rock Products from any decree, judgment or claim arising in said litigation, but in the event any claim be asserted against Read in the said litigation or in any other respect arising out of Bethers operations on the premises described in the Option, then Bethers shall indemnify and hold Read harmless of and from any such claims, including reasonable attorneys fees.

6. Enforcement. In the event it becomes necessary for either party to institute suit to enforce the provisions of this Agreement, then the prevailing party in such litigation shall be

entitled to recover costs and attorneys fees from the party in default.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.




Dwaine L. Bethers

June 26 1991

READ:

L. Clifton Read, Jr.
Address: P.O. Box 30170
Laughlin, Nev.

BETHERS:

Ray Bethers
Address: Kamas, Utah
84036-0455

# Appendix G

# ASSIGNMENT OF OPTION

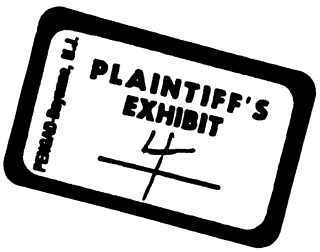
THIS ASSIGNMENT OF OPTION is made and entered into as of this 5TH day of May, 1995, by and among CUSTOM CRUSHING, INC., a Utah corporation, ("Custom Crushing") and RAY BETHERS ("Bethers").

R E C I T A L S:

A. On February 6, 1986 Don, Norma and Steve Fitzgerald (collectively "Fitzgeralds") entered into a written "Option for Purchase of Sand and Gravel" with L. Clifton Read, Jr. ("Read") to allow Read to remove and sell sand and gravel from certain Property described as the SW 1/4 of the NE 1/4 of Section 32, Township 2 South, Range 6 East, Salt Lake Base and Meridian ("the Property"). Said Agreement is recorded as Entry No. 283655 in the records of the Summit County Recorder.

B. On June 26, 1991 Bethers took assignment of all of Read's right, title and interest to the Property through a written "Purchase and Broker Agreement" with Read, whereby Bethers took assignment from Read of all of his rights under the February 6, 1986 "Option for Purchase of Sand and Gravel."

C. Now Bethers desires to assign all of his rights to the Property under the "Option for Purchase of Sand and Gravel" and 'Purchase and Broker Agreement" to Custom Crushing, and Custom :rushing desires to accept such assignment pursuant to the terms nd conditions of this Assignment of Option.



NOW THEREFORE, for and in consideration of the mutual promises and covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree and represent as follows:

1. Assignment of Rights by Bethers

Bethers will forever assign to Custom Crushing all right, title and interest in and to the Property and to all sand, gravel, aggregate or other rock or earth products produced on or from the Property. In consideration for such release and waiver, Custom Crushing shall pay Bethers twenty cents (20¢) per ton royalty for all sand, gravel, aggregate or other rock product sold which is produced and sold on or from the Property during the term of "The Option for Purchase of Sand and Gravel".

2. Payment in Materials

Bethers shall not be entitled to any monetary payment for the royalty described in Paragraph 1, but agrees to accept as his exclusive method of payment compensation in the form of product produced in the sand and gravel operation on the Property. The value of one such product, road base, is agreed to be $3.18 per ton for 1995. The value of any other product(s) shall be as agreed by the parties. During future year(s) the value shall be adjusted annually by changes in equal proportion to the changes in price for sales by Custom Crushing from the Property of product. Bethers shall have the right to select the type of product he desires, subject to the limitations herein, and further agrees to take product to satisfy his royalty within one year of his being given

notice that he is entitled to such royalty by Custom Crushing from the sand and gravel operation during the normal business hours and regular season of the operation. Bethers shall be provided product by Custom Crushing only when such product is available during the normal operations of the gravel pit operation. Bethers shall have no right to require Custom Crushing to work beyond normal operation hours or regular days and seasons of operation. No royalty shall be due to Bethers for sand, gravel aggregate or other rock product produced to satisfy Bether's royalty.

3. Timing of Payment and Inspection of Records

Custom Crushing shall advise Bethers monthly of the amount of royalty set forth in Paragraph 1. Bethers shall have the right to inspect, upon reasonable notice, the records of Custom Crushing as to tonnages produced and sold at the Property. Bethers shall take such product to satisfy his royalty within one year of such notice.

4. Payments to Read

Bethers shall be responsible for any and all payments, compensation or monies due or owing to L. Clifton Read, C.R. Sales, Inc. and/or Park City Rock Products under the "Purchase and Broker Agreement" or for any other reason and Bethers shall hold harmless and indemnify Custom Crushing from all claims, causes of action, liability, costs, expenses or attorneys fees arising from any claim of L. Clifton Read, C.R. Sales, Inc. and/or Park City Rock Products.

5. Use of Scales

Bethers shall leave and make available for the use of Custom Crushing the scales and all other personal property currently on the Property. Custom Crushing shall maintain the scales in good operating condition, normal wear and tear excepted. If Custom Crushing determines that the scales are not needed, Custom Crushing shall notify Bethers, and Bethers shall at his own cost and expense remove said scales. At the end of the term of "The Option for Purchase of Sand and Gravel", Bethers may take possession of the scales.

6. Purchase of Additional Product

Bethers shall have the right to purchase from Custom Crushing additional product produced on the Property at the same value as established for royalty purposes.

7. Payment to MCM Engineering

Bethers shall be responsible for and hold harmless and indemnify Custom Crushing the outstanding balance due and owing MCM Engineering for its services in seeking land use approval for the sand and gravel operation on the Property from Summit County and in seeking and obtaining land use approval from the Town of Francis.

8. Operation and Delivery

Bethers shall have no right to operate any sand and gravel operation on the Property, and has expressly assigned any such right to Custom Crushing. Delivery of product to Bethers shall be weighed and loaded at the Property in the same method as delivery to all purchasers of product from the Property.

9. Execution of Documents

The parties agree to timely execute and deliver all deeds and other documents necessary to effectuate the terms hereof.

10. Binding

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their heirs, agents, personal representatives, successors and assigns.

11. Paragraph Numbers and Headings

The paragraph and subparagraph headings and numbers used herein are for purposes of convenience only and shall not be considered in the interpretation of this Agreement.

12. Full Agreement

This Agreement contains the full agreement of the parties, and there are no other agreements, verbal or otherwise.

13. Modification in Writing

This Agreement may only be modified or changed by a writing signed by both parties.

Made and entered into as of the day and year first above written.

Ray Bethers

RAY BETHERS

SUBSCRIBED AND SWORN to before me by Ray Bethers this 5TH day of May, 1995.

Dwaine L Bethers

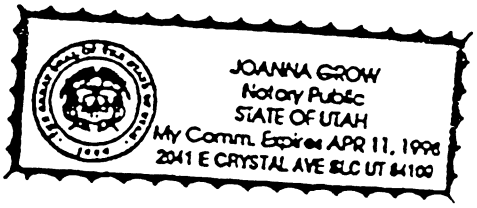
Notary Public

Notary Public
DWAINE L BETHERS
1108 West Carmelia Dr.
Salt Lake City, Utah 84123
My Commission Expires
July 23, 1996
State of Utah

CUSTOM CRUSHING, INC.

By _____
Steve Zabriskie,
Its President

SUBSCRIBED AND SWORN to before me by Steve Zabriskie, President, Custom Crushing, Inc. this 12th day of May, 1995.




_____
Notary Public

PS>E:\CUSTOMCR\OPTION.ASS

# Appendix H

# LEASE AGREEMENT

THIS LEASE AGREEMENT is made and entered into as of this 6th day of June, 1995, by and among DON M., NORMA and STEVEN FITZGERALD, owners of certain real property in Summit County (collectively "Fitzgeralds") and Custom Crushing, Inc. ("Custom Crushing"), a Utah corporation.

## RECITALS:

A. Fitzgeralds are the owners of certain real property in Summit County, Utah, described as the SW¼ of the NE¼ of Section 32, T2S, R6E, Salt Lake Base and Meridian, ("the Property") where a gravel pit operation has been conducted in previous years.

B. Fitzgeralds and Custom Crushing have cooperated in obtaining the Annexation of the Property to the Town of Francis and in obtaining a Conditional Use Permit to once again operate a gravel pit on the Property for a period of ten (10) years.

C. Fitzgeralds and Custom Crushing are continuing to work together to defend litigation that has arisen contesting the validity of the Permit and the ability of Custom Crushing to operate the gravel pit on the Property without creating a nuisance.

D. The parties desire to enter into a Lease to allow Custom Crushing to operate a gravel pit on the Property, and Custom Crushing is ready, willing and able to begin operation of a sand and gravel pit on the Property and has received certain governmental approvals for such operation.

NOW THEREFORE, for and in consideration of the mutual promises and covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree and represent as follows:

PLAINTIFF'S EXHIBIT

1. Lease of Property

Custom Crushing will have the exclusive right to possession of and removal of sand, gravel, and other rock product ("Product") from the Property and shall lease the Property from Fitzgeralds for a period of ten years from the date of this Lease Agreement. Fitzgeralds are entitled to a 30¢ per ton royalty for all Product produced and sold. However, Custom Crushing shall pay Fitzgeralds a royalty of 26¢ per ton of Product produced and sold on the Property until such time as Custom Crushing is no longer obligated to provide compensation to Ray Bethers. The deduction of 5¢ per ton royalty shall be a business expense of Fitzgeralds. No royalty shall be paid to Fitzgeralds for the Product produced for Ray Bethers in payment of his royalty. At the time Custom Crushing is no longer obligated to provide compensation to Ray Bethers, the royalty to Fitzgeralds shall be increased to 50¢ per ton.

2. Option Period

Fitzgeralds grant Custom Crushing an exclusive option to extend the Lease so long as the Conditional Use Permit for a gravel pit on the Property is renewed or extended upon the terms and conditions as agreed to between the parties at that time.

3. Obligations of Fitzgeralds

Custom Crushing and Fitzgeralds have received a Conditional Use Permit from the Town of Francis to operate a pit on the Property. However, such permit has been challenged in Third District Court by certain neighboring property owners. Fitzgeralds shall have no obligation to participate financially in defending such litigation or obtain other approvals or to post required security for reclamation, or pay costs of reclamation of the Property. However, Fitzgeralds shall cooperate in every non-financial way in defending the litigation and

in obtaining necessary approvals for the operation of the gravel pit. Fitzgeralds shall be responsible to provide water for the gravel pit operation as set forth herein, and shall use their best efforts to obtain approval from the State Engineer for such use of their water rights.

4. Obligations of Custom Crushing

Custom Crushing shall operate the gravel pit on the Property under the terms and conditions of the Conditional Use Permit and other applicable state and federal law. If, despite the pending litigation, Custom Crushing is able to begin operation of the gravel pit and produce Product, Custom Crushing shall be responsible for twenty-five percent of the cost of reclaiming the pit area, beyond the obligations of Custom Crushing which it assumed under the Ray Bethers Agreement, according to the reclamation plan prepared by MCM Engineering, and approved by the Town of Francis for each year Custom Crushing operates the gravel pit (i.e., Custom Crushing shall be responsible for the cost of reclamation as follows: 1st year - 25%, 2nd year - 50%, 3rd year - 75%, 4th year - 100%). After four years of operation, Custom Crushing shall be responsible for one hundred percent of the cost of reclamation. If reclamation is required before the expiration of the four-year period, Custom Crushing shall make available any on-site equipment it has for reclamation at its cost.

5. Timing of Payment and Inspection of Records

Custom Crushing shall pay Fitzgeralds the twenty-six cents (26¢) per ton royalty set forth in Paragraph 1 monthly within fifteen days of the end of each month. Fitzgeralds shall have the right to inspect, upon reasonable notice, the records of Custom Crushing as to tonnages produced and payments received by Custom Crushing.

6. Execution of Documents

The parties agree to timely execute and deliver all deeds, permits, and other documents necessary to effectuate the terms hereof and to operate the gravel pit.

7. Insurance

Custom Crushing shall hold harmless and indemnify Fitzgeralds from all claims or liability arising from its operation of the gravel pit, and Custom Crushing shall at all times maintain general liability insurance with a minimum coverage of $1,000,000.00. Fitzgeralds shall be named as an additional insured on Custom Crushing's policy, and shall be given a Certificate of Insurance.

8. Binding

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their heirs, agents, personal representatives, successors and assigns.

9. Paragraph Numbers and Headings

The paragraph and subparagraph headings and numbers used herein are for purposes of convenience only and shall not be considered in the interpretation of this Agreement.

10. Water

Fitzgeralds shall have responsibility to provide water from water rights and water sources held by them for the gravel pit operations. Fitzgeralds have already received temporary approval from the Utah State Engineer to use a portion of its water rights for the gravel pit operation. Fitzgeralds shall be responsible for all costs associated with obtaining that temporary approval and shall seek to obtain permanent approval for such use of their water rights in the

gravel pit operation. Fitzgeralds shall have the right to use any water not used in the gravel pit operation.

11. Default

If either party defaults, the non-defaulting party shall give the other written notice of the default and a thirty-day period to cure. If the defaulting party fails to cure within the thirty-day period, the non-defaulting party may bring an action in court to seek damages or equitable relief. The prevailing party shall be entitled to its reasonable expenses, including attorneys fees incurred.

12. Full Agreement

This Agreement contains the full agreement of the parties, and there are no other agreements, verbal or otherwise.

13. Assignment

Custom Crushing shall only assign its rights under this Agreement to another person or entity that is ready, willing and able to operate the gravel pit.

14. Scales

Custom Crushing shall abide by all state, federal and local laws requiring the certification of its scales, and upon request will provide proof of such certification to Fitzgeralds.

15. Modification in Writing

This Agreement may only be modified or changed by a writing signed by both parties.

Made and entered into as of the day and year first above written.

DON FITZGERALD

SUBSCRIBED AND SWORN to before me by Don Fitzgerald this 6th day of June, 1995.

Notary Public

NORMA FITZGERALD

SUBSCRIBED AND SWORN to before me by Norma Fitzgerald this 6th day of June, 1995.

Notary Public

STEVEN FITZGERALD

SUBSCRIBED AND SWORN to before me by Steven Fitzgerald this 6th day of June, 1995.

Notary Public

CUSTOM CRUSHING, INC.

NOTARY PUBLIC
CYNTHIA E. PHOKOP
68 East South Temple #1100
Salt Lake City, Utah 84111
My Commission Expires
September 9, 1998
STATE OF UTAH

STEVE ZABRISKIE

On the 6th day of June, 1995, personally appeared before me Steve Zabriskie, who being by me duly sworn did say that he is the president of Custom Crushing, Inc., and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and said Steve Zabriskie duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

Notary Public

NOTARY PUBLIC
CYNTHIA E. PHOKOP
68 East South Temple #1100
Salt Lake City, Utah 84111
My Commission Expires
September 9, 1998
STATE OF UTAH